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L. Eng. B 54 d. Railways 4

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L. Eng. B 54 d. Railways 4

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CASES



RELATING TO

RAILWAYS AND CANALS,

ARGUED AND ADJUDGED IN THE

Courts of Law and Equity.

1842 TO 1846.

BY

JOHN MONSON CARROW, } AND { EDWARD BEAVAN,
LIONEL OLIVER, } { THOMAS E. P. LEFROY,

ESQUIRES, BARRISTERS-AT-LAW.

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JUDGES OF THE SEVERAL COURTS

DURING THE

PERIOD OF THE DECISIONS REPORTED IN THIS VOLUME.

The High Court of Chancery.

LORD LYNDHURST	}	<i>Lord High Chancellors.</i>
LORD COTTENHAM		
SIR LANCELOT SHADWELL		<i>Vice-Chancellor of England.</i>
SIR JAMES LEWIS KNIGHT BRUCE	}	<i>Vice-Chancellors.</i>
SIR JAMES WIGRAM		

Court of Queen's Bench.

LORD DENMAN		<i>Lord Chief Justice.</i>
SIR JOHN PATTESON	}	<i>Justices.</i>
SIR JOHN WILLIAMS		
SIR JOHN TAYLOR COLERIDGE		
SIR WILLIAM WIGHTMAN		
SIR WILLIAM EBLE		

Court of Common Pleas.

SIR NICHOLAS CONYNTHAM TINDAL	}	<i>Lord Chief Justices.</i>
SIR THOMAS WILDE		
SIR THOMAS COLTMAN	}	<i>Justices.</i>
SIR WILLIAM HENRY MAULE		
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Court of Exchequer.

SIR FREDERICK POLLOCK		<i>Lord Chief Baron.</i>
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Solicitor-Generals.

- SIR FREDERICK THESIGER.
- SIR FITZROY KELLY.
- SIR JOHN JERVIS.
- SIR DAVID DUNDAS.

MEMORANDA.

IN July, 1846, Lord *Lyndhurst* resigned the Great Seal, which was delivered to Lord *Cottenham*, who resumed his seat in Lincoln's Inn Hall, as Lord Chancellor, on the 7th July, 1846.

In the same month Sir *Thomas Wilde* succeeded Sir *Frederick Thesiger* as Attorney-General; and *John Jervis*, Esq., Patent of Precedence, succeeded Sir *Fitzroy Kelly* as Solicitor-General.

In the following month, Sir *Thomas Wilde*, her Majesty's Attorney-General, was appointed Chief Justice of the Common Pleas, in the place of Sir *N. C. Tindal*, deceased; and *John Jervis*, Esq., was appointed her Majesty's Attorney-General; and *David Dundas*, Esq., was appointed her Majesty's Solicitor-General, and they afterwards received the honour of knighthood.

In September, 1846, Sir *William Erle*, one of the Judges of the Common Pleas, was appointed a Judge of the Queen's Bench, in the place of Sir *John Williams*, deceased; and *Edward Vaughan Williams*, Esq., one of her Majesty's Counsel, was appointed a Judge of the Common Pleas, and thereupon received the honour of knighthood.

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ERRATA ET ADDENDA.

Page 36, line 1, for " Vict. " read " Will. 4. "

175, note, after " 61 " add " and S. C., 15 Sim. 88. "

209, note (b), after " 813 " add " & 873. "

385, two lines from bottom of page, for " 52-3ds " read " 5-23rds. "

387, in marginal note, after " agreement " add " entered into by them. "

539 to 541 inclusive, in margin, for " 1846 " read " 1847. "

RAILWAY AND CANAL CASES.

COURT OF QUEEN'S BENCH.

In Easter Term, 1844.

1844.

THE QUEEN v. THE GRAND JUNCTION RAILWAY COMPANY. *May 10th.*

THE Grand Junction Railway Company, in and by a A Railway Company, certain rate made for the relief of the poor of the parish formed under stat. 3 Will. 4,

c. xxxiv, were empowered to purchase lands and construct a railway thereon; and to take certain tonnage and fares for goods and passengers, and to provide locomotive engines, &c., and receive such sums for the use thereof as the Company should fix. And when the Company themselves acted as carriers for their own profit, (which they were empowered to do), they were to keep separate accounts of the tolls which they did receive, and of the tolls which they would have received for the passengers, &c., if they had been carried by other persons. All persons had liberty to use the railway with carriages, subject to regulations by the Company, and on payment of toll to them. The railway was used partly by the Company, as carriers of goods and passengers for their own profit, and partly by other Companies, who paid tolls to them for the use of it, some providing for themselves locomotive power, carriages, stations, and watering places, &c., and others finding carriages only, and hiring power, &c., from the Company.

In a rate made for the relief of the poor of a parish through which the railway passes, but in which there are no stations or buildings—*Held*, that the Company were rateable for their railway at an amount equal to the rent which a lessee would pay, making the same uses of the railway as the Company; [that is, that they were rateable, after due deductions according to the Parochial Assessment Act, (6 & 7 Will. 4, c. 96, s. 1), on the sums which they received as fares and tonnage for passengers and goods which they carried, as well as on the amount of tolls which they received from other carriers on their railway]; and that an estimate of the Company's liability, founded on the amount chargeable in respect of tolls only, was erroneous.

The parish officers adopted, and the sessions approved the following mode of calculating the net annual value of the Company's rateable property in their parish.

They ascertained the gross receipts of the Company for one year, £440,366, and made therefrom the following deductions:—

1. £5 per cent., for interest on £255,000, the capital employed in engines, carriages, and other moveable stock, in their business as carriers.
2. £20 per cent. on the same capital, for tenant's profits and profits of trade.
3. £12 10s. per cent. on the same, for the depreciation of such stock, beyond usual repairs and expenses.
4. £198,962, for the annual cost of conducting the business.
5. £9150, for the land occupied by stations and other buildings, separately rated in the parishes in which they are situate.
6. £30 per mile, for the reproduction of rails, chairs, sleepers, &c.

Held, that these deductions (the reasonableness in amount of which is a question for the sessions) included all that was properly referable to the trade, as distinguished from the increased value given by it to the land; and that the balance (£135,589) was properly taken as fairly representing the rent which a yearly tenant would give for the occupation of the railway.

And that no deduction was to be made for goodwill.

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of Seighford, in the county of Stafford, on the 6th day of August, 1843, were rated, in respect of the Grand Junction Railway passing through the said parish and land adjoining, in the sum of £1050. Upon appeal duly made against the said assessment, the sessions confirmed the rate, subject to the opinion of this Court upon the following case:—

The appellants were incorporated, and the Grand Junction Railway formed by and under an act, 3 Will. 4, c. xxxiv, (local, personal, and public), altered, amended, and extended by other acts of Parliament, namely, 4 Will. 4, c. iv; 5 Will. 4, c. viii; 5 Will. 4, c. ix; 1 & 2 Vict. c. lix; 3 Vict. c. xlix; which are to be taken to be part of this case (*a*). Under these several acts, not only has the line of railway, as originally contemplated, from Warrington to Birmingham, been constructed and opened for public use, but other railways made by other parties, from Warrington to Newton, and from Crewe to Chester, and long since opened, have been vested in, and become the property of the appellants, and these, by the provisions of the said acts, or some of them, now form part of the Grand Junction Railway, and the whole is managed, as to accounts and otherwise, as one entire business.

Over all these railways so constructed and open, and also over the Liverpool and Manchester Railway, between Newton and Liverpool in the one direction, and Newton and Manchester in the other, the appellants themselves exercise the right of being carriers on their own account of passengers and goods, providing for themselves stations or stopping-places, locomotive power, carriages, coke, and watering places, and all other things necessary and convenient for the conveyance of passengers and goods, and charging for such conveyance reasonable fares and freights,

(*a*) The material sections of the acts are similar to those in the case of *Regina v. The London and South Western Railway Company*, Antè, Vol. 2, p. 629; 1 Q. B. R. 558; 2 G. & D. 49.

in addition, as regards the said Grand Junction Railway, to the tolls or tonnages which they are authorized by the said acts to take ; and by this carrying trade, as well as by the toll, the appellants make profits.

Other parties also exercise the right of being carriers over various parts of the Grand Junction Railway, and, amongst others, over that part which is in the respondent parish ; providing for themselves, without the consent or concurrence of the appellants, and independently of them, (subject, however, to the control of the appellants, under the provisions of the said several acts of Parliament, and also subject to the provisions of the several acts of Parliament for the regulation of railways), locomotive power, carriages, coke and watering places, and all other things necessary and convenient for the conveyance of passengers and goods, and separate stations and stopping-places adjoining the railway, and the needful branches into, or communications with the same ; and they, like the appellants, make profits of their trade so carried on by them over the railway ; and they pay to the appellants the tolls or tonnage duly fixed by the appellants pursuant to the said acts, or some of them, and being the same tolls as form the basis of the calculations hereinafter mentioned, as contended for by the appellants.

A third class of carriers over the Grand Junction Railway hire from the Grand Junction Railway Company locomotive engines, and the use of stations, &c., but find their own carriages ; and they likewise make profits over the railway : these also pay to the appellants the said tolls or tonnages, besides a compensation for the use of the power, stations, and other accommodations provided for them.

The total length of so much of the Grand Junction Railway as lies between Birmingham and Newton is eighty-four miles, and from Crewe to Chester twenty-one miles,

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making together one hundred and five miles; and the distance along the Liverpool and Manchester Railway from Newton to Liverpool is fifteen miles, and from Newton to Manchester sixteen miles; the length of railway within the respondent parish is one mile, and there is no station, stopping-place, or property of the appellants other than the railway itself in the said parish.

The appellants have duly caused toll-boards or lists to be made and published, as required by sections 165 and 166 of the statute first above mentioned. The appellants have also duly kept the accounts of tolls, as required by sections 19 and 20 of the 1 & 2 Vict. c. lix, and section 27 of 3 Vict. c. xlix; and free access has been afforded to them, as required by those acts. The fares and charges for the conveyance of passengers, goods, parcels, &c., by the appellants as carriers, are regulated by the number of miles through which they are carried, as well as by weight, bulk, value, &c., and various other circumstances, in like manner as the fares and charges of other carriers.

The gross sums received by the appellants as tolls, rates, or duties, including what they receive from other Companies or persons using the railway as carriers, and also the tolls, rates, or duties, of which an account is kept, calculated upon all the passengers, goods, &c., as aforesaid, carried by them for their own profit, added together, amount actually to the sum of £1500, in respect of so much of the railway as lies in the respondent parish, for the current year of rating: and this is the gross produce of the land which the appellants, if not carriers, or which a lessee of the tolls, rates, and duties would in fact have received as such lessee, howsoever or by whomsoever the carrying business of the railway was conducted; and the appellants contended that this sum (£1500), so found, ought to form the basis of any rate upon them in respect of their rateable property in the respondent parish.

The gross yearly receipts of the Company, including as well the tolls actually received by them, as the tolls, fares, freights, and profits of every kind derived by them as carriers upon and owners of the Grand Junction Railway, and its appurtenances, in all the parishes between Birmingham and Newton, and Crewe and Chester, (but excluding their receipts over the Liverpool and Manchester, and other railways which do not belong to them, but for passing over which as carriers, they pay toll in the same way as the independent carriers over the Grand Junction Railway); and including also the profits of their stock in trade and personal property used by them as carriers in connexion with and upon the entire Grand Junction Railway, and their working over and along it; and also the rents, profits, and value of all their stations and other conveniences at and between Birmingham and Newton, and Chester and Crewe, are agreed for the purposes of this case to amount to the sum of £440,366 for the current year of rating; and adopting the principle of a mileage division thereof, that is to say, dividing the same by 105, being the total length of the Grand Junction Railway, the amount is £4193 (and a fraction), in respect of so much thereof as lies in the respondent parish; and it is for the purpose of the present case admitted, that the mileage principle of division is fair and equal as respects the respondent parish.

It was admitted and agreed (subject to the opinion of the Court as to the propriety and principle of each item of deduction) that if the £1500 (that is to say, the amount of tolls) is to be adopted as the basis of calculation, then the full net annual value of the appellants' rateable property within the respondent parish will be 712*l.* 10*s.*, being the £1500 minus the following deductions, which the court of quarter sessions find to be reasonable in fact, viz.—

First, £20 per cent. thereof for the tenant's subsist-

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ence and profits, regard being had in this case to the extensive amount of responsibility, risk, &c. Secondly, 2l. 10s. per cent. for the collection of the tolls.

Thirdly, £350 per mile for the maintenance of the railway, with the works and fences, and for gate-keepers, and also for engineering and police, as to so much of the two latter items as are fairly chargeable on the proprietors of the railway as such.

Fourthly, £70 per mile for poor-rates, highway rates, church rates, and tithe commutation rent-charge.

Fifthly, £30 per mile for renewing or reproducing those portions of the subject of the rate which are of a perishable nature, such as the rails, chairs, sleepers, &c., when rendered necessary by accident or decay.

The parish officers adopted, and the court of quarter sessions sanctioned, by their judgment, a different mode of arriving at the net annual rateable value of the property of the appellants in the parish. They ascertained the gross yearly receipts of the Company throughout the railway as stated above, viz. the sum of £440,366, and then made therefrom the following deductions; the propriety, principle, and completeness of such deductions, as well as the propriety and principle of the respondents' mode of arriving at the net annual rateable value of the rateable property of the appellants in the parish, being referred to the opinion of this Court, and the court of quarter sessions finding such deductions to be reasonable in fact, viz.—

First, £5 per cent. for interest on £255,000, being the capital necessary for, and actually invested by the appellants in the purchase of engines, carriages, and all the other moveable stock necessary for the business of the carriers as conducted by them in manner aforesaid.

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and in connexion with it, and the conduct of traffic upon it, the respondents further deducted the fair annual value thereof, viz. £9150.

Sixthly, £30 per mile for renewing or reproducing rails, chairs, sleepers, &c., as before.

The balance, amounting to the net sum of £135,589, was taken to be the net annual value of the whole railway, independently of the stations and other buildings, &c., rated separately; and the sessions found, as an inference from the above facts, that the railway and other corporeal hereditaments of the Company in connexion with the railway might reasonably be expected to let to a tenant from year to year at the last-mentioned sum of £135,589, exclusive of the rent of the stations and other buildings rated separately; such tenant being assumed to have the power of using the railway and all its appurtenances, now the property of the Company, under the same circumstances as the Company, and with no other privileges and advantages than the Company now possess. The principle of mileage being agreed upon by both parties as fair for the purposes of this rate, both as applied to the expenses and deductions, as well as receipts, the net annual rateable value of so much of the railway as lies in the respondent parish is to be taken at £1050 at least, supposing the principle of rating adopted by the parish officers in the case to be just and correct.

Of the total net receipts of the Company, only about £30,000 per annum are received in the shape of tolls from other parties using the railway on their own account.

All the other rateable property in the respondent parish is rated upon an estimate of the net annual value thereof within the meaning of the Parochial Assessment Act (a),

(a) The 6 & 7 Will. 4, c. 96, s. 1, enacts, "that from and after the 21st of March, 1837, no rate for the relief of the poor in England and Wales shall be allowed by any justices, or be of any force,

and without directly taking into account any receipts, expenses, or allowances having reference to the amount of actual profit made thereon.

The appellants have not any stations or buildings in the respondent parish. In various parishes along the line of railway, the parties who, as before mentioned, use the railway as carriers, and have stations with buildings and with branches into the railway, and other conveniences connected with the railway, are not rated (in particular parishes or elsewhere) upon or in respect of, or with reference to the Grand Junction Railway, but solely for their stations. The appellants derive no pecuniary profit whatever from their land in the respondent parish, except from the tonnages and tolls, and from their fares and other receipts hereinbefore mentioned, and their trade as carriers in common with all other carriers over the same, if, indeed, these latter profits are to be considered as profits arising from the land, which the appellants contend that they are not.

The appellants contend, that, even supposing the rate to be founded on a just principle and proper basis, the deductions allowed by the respondents do not include all the items necessary to bring out the net annual value, that is to say, the rent at which what the respondents contend is the appellants' rateable property might reasonably be expected to let from year to year; amongst which omitted de-

which shall not be made upon an estimate of the net annual value of the several hereditaments rated thereunto; that is to say, of the rent at which the same might reasonably be expected to let from year to year, free of all usual tenant's rates and taxes, and tithe commutation rent-charge, if any, and deducting therefrom the probable average annual cost of the

repairs, insurance, and other expenses, if any, necessary to maintain them in a state to command such rent: Provided always, that nothing herein contained shall be construed to alter or affect the principles or different relative liabilities, if any, according to which different kinds of hereditaments are now by law rateable."

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ductions the appellants instance, by way of example, an annual allowance for goodwill.

The sessions adopted the principle of rating and the deductions contended for by the respondents, as furnishing the net annual value of the appellants' rateable property pursuant to the Parochial Assessment Act, and confirmed the rate accordingly; but, on the application of the appellants, granted a case for the opinion of the Court of Queen's Bench on the several questions hereinbefore raised and stated; the Court to have the power of amending or of quashing or otherwise dealing with the rate as they may deem right.

The case was argued in Michaelmas Term, (November 15th, 1843), by *Kelly* and *Smirke*, for the respondents, and *Sir W. Follett*, Solicitor-General, and *M. D. Hill*, for the appellants; when, by desire of the Court (*a*), it was turned into a special case; and, in the Hilary Term following, (January 17th, 1844), came on for argument (*b*).

M. D. Hill, for the appellants.—The question here is, whether, as the appellants contend, the Railway Company is to be rated on the principle of tolls. No dispute arises as to the amount of deductions to be made from the rateable value, if that can be ascertained. The rule by which Canal Companies are to be rated has been clearly laid down in *Rex v. The Trustees of the Duke of Bridgewater* (*c*), and is equally applicable to railways, which, for the purposes of rating, do not in any respect differ from canals. The authority of that case has never yet been called in question, and has in effect been confirmed by the recent decision

(*a*) Lord *Denman*, C. J., *Williams*, *Coleridge*, and *Wightman*, Js. *Patteson*, *Coleridge*, and *Wightman*, Js.
 (*c*) 9 B. & C. 68.

(*b*) Before Lord *Denman*, C. J.,

Of this Court in *Regina v. The London and South Western Railway Company* (a). In *Rex v. The Trustees of the Duke of Bridgewater* (b), Bayley, J., says, "The profits of carrying goods are the profits of their (the trustees') trade. The tonnage [tolls] is the profit of the land occupied by them. The other sums received by them constitute the profits of their trade. The principle of our decision in this case is, that the same rule is to be applied to all occupiers; and that the rent or sum at which the land will let is the criterion of the value of the occupation." So, in the present case, the value of the tolls which the Railway Company receive, furnishes the basis of the rate on which they ought to be rated. The fact of this Company receiving tolls from others who use their road, was wanting in *Regina v. The London and South Western Railway Company* (a); there the judgment proceeded on the ground that no tolls were in fact taken, and that, therefore, some other criterion than tolls must be used for ascertaining the rateable value; and it was held, that the rateable value was what a tenant would be willing to give to stand in the place of the Company under the circumstances as they then existed. Here the circumstances are different; but the same principle is to be applied in ascertaining the amount, namely, what a tenant would give, subject to the usual deductions, to receive the tolls which the Company are now receiving from others who use their railway, added to a similar amount of toll on their own traffic. Unless these tolls furnish the criterion, it is difficult to conceive the object of the 27th section of the Company's act (c), by which they are compelled to set out fully, in a book kept for that purpose, and open to the inspection of parish officers, the amount of

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(a) Antè, Vol. 2, 629; 1 Q. B.
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(b) 9 B. & C. 68.

(c) 3 Vict. c. xlix.

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tolls actually received by them, as well as the price which a stranger would give to receive them for the Company. The produce of land which is the subject of a rate cannot, in any case, be greater in value than the sum paid for the use of the land; and whatever the Company make themselves by their own use of their railway, over and above what the public pay them for being admitted to use it also, together with what the Company, as carriers, would pay in toll, if they were not also proprietors, is made in the way of profits of trade, and as such cannot be rated. *Rex v. Bradford (a)* is rather in favour of than opposed to the view which the appellants take in the present case. There a canteen in barracks was demised, together with the privilege of selling the provisions and liquors, and the tenant was held to be rateable on the value of the building, with the privileges demised with it; so, in this case, it is admitted, that not only is the land rateable on which the railway is constructed, but the privilege also of taking tolls from others who make use of it. Beyond that, nothing can properly be the subject of demise, and what is not demisable is not rateable: *Rex v. The Trustees of The Duke of Bridgewater (b)*. In *Rex v. Bradford (a)*, nothing but the building and the exclusive privilege of selling liquors was or could have been demised, but the tenant was at liberty afterwards to use them in such a way as would be most profitable to himself, and according to his skill and industry would the profits of his trade be greater or less. So here, together with the railway, the Company are able to demise the privilege which they are allowed of taking tolls from the public, who become carriers upon it; but the profits arising from their own use of the railway, by acting as carriers, are profits of trade, and, as before stated, could not properly be the subject either of demise, or, consequently, of rate, as the amount would obviously depend, not

(a) 4 M. & S. 317.

(b) 9 B. & C. 68.

on the value of the land, but on the industry or capital of the occupier, in his capacity of carrier. The profit which the Company receive from acting themselves as carriers, is that which might arise to them even after they had demised all their tolls to a tenant. They would then have the power, as strangers now have, of carrying; and that would be a privilege which, if the subject of demise at all (which it is not), might well be passed to other persons than those in receipt of the tolls. It is like the goodwill of a business which a lessee purchases in addition to the premises and stock in trade of the person who retires from it. The goodwill is distinct from the real subject of demise; it may or may not be disposed of with it, and must be paid for over and above the visible property, either by a gross sum, or by an annual allowance to the lessor. If the respondents are right in their estimate of the rateable value, it will follow, that, where two establishments, the same in size, and with the same advantages in situation and other capabilities, carry on the same trade, but one with a better business, and, consequently, greater profits than the other, the one in which the profits of trade are the higher must be also rated higher than that in which the profits are less, which would clearly be an injustice. To ascertain the profits of trade, too, is beyond the calculation of parish officers who have to make a rate; and all the evils of rating such profits, which have induced the Legislature to declare them exempt, would arise in this case if the rate which has been made is held good.

Kelly, contra.—It is admitted in this case, that, however complicated the calculations may be in fixing the exact amount of rate, the principle on which the Company must be rated is the only matter in dispute. That, however, the Court will not have much trouble to ascertain, as it has been denoted by the Legislature, and adopted already in *Regina*

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v. *The London and South Western Railway Company* (a). By the first section of 6 & 7 Will. 4, c. 96, it is enacted, “ that no rate for the relief of the poor in England and Wales shall be allowed by any justices, or be of any force, which shall not be made on an estimate of the *net annual value* of the several hereditaments thereunto rated, that is to say, of the rent at which the same *might reasonably be expected to let* from year to year,” free from certain deductions which are allowed. The simple question, therefore, in this case is, what would a tenant give on the day this rate was made to hire the railway, and stand in all respects in the place of the Company? and, in calculating the amount, of course all the benefits which accrue to the Company, whether as carriers or toll takers, must be taken into consideration. The only difference between this and the case of *Regina v. The London and South Western Railway Company* (a) is, that in the latter the railway was entirely in the hands of the Company, and they, therefore, were the only carriers on their own road; whereas here, besides acting as carriers, the Company receive tolls from others who carry for themselves, and thus have a benefit arising not from carrying alone, but from tolls also. In the former case, the public had a right to use the railway, which they did not exercise; here the same right exists, and it is exercised. In both cases, however, the *receipts* of the Company must be rated, no matter whether arising partly from one source or partly from another, as it is clear that both would be items in the calculation of a tenant who was about to hire the railway from the Company. What a tenant would look at would be the state of facts existing in connexion with the railway; here he would find a Company in the receipt, in round numbers, of £500,000 a year, and this sum, minus the usual deductions for expenses, profits of

(a) Antè, Vol. 2, p. 629; 1 Q. B. R. 558; 2 G. & D. 49.

trade, tenant's profits, and other allowances, he would be willing to give to place himself in the full exercise of all the rights which the Company possess. The facts, therefore, as was decided in the former case, are only to be looked at here, and the same principle must be applied, namely, the net annual value really received; and this, subject to the proper deductions, will be the ground-work of the rate. [Lord *Denman*, C. J.—That is clearly the right view; the difference then is only a difference in figures.] The real point in contention is this,—that the other side contend that the rate should be calculated only on the tolls which the Company receive, viz. the tolls which would be paid by others if others paid tolls for carrying whatever is now carried by the Company, rating therefore an imaginary trade. We, on the other hand, say, that the calculation should not be made on an imaginary trade, but on existing facts; that about £30,000 per annum is actually received in tolls, besides £450,000 which the Company take as carriers; and that these two sums added together, minus the proper deductions, form the subject of the rate. This latter is obviously a much more convenient principle than the other, and is the one which would guide any tenant who was about to take a lease of the railway. It is no objection to our principle to say, that the profits which the Company made as carriers may vary in other years, or in different hands; such may probably be the case; but the simple answer is, that, when the profits vary, the rate must vary also, in order that each rate may be calculated according to the facts in existence from time to time. *Rex v. The Trustees of the Duke of Bridgewater* (a) was a case very unlike the present; there the rate which had been imposed was unequal, because tenant's profits had been improperly included in it; whereas here that has

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not been done. The fact, as found by the case, that the Company receive as carriers five times as much as all the rest of the world besides, sufficiently shews, that, practically, the Company enjoy great advantages over all others, and should be rated accordingly. The case of a banker is quite different. The profits of a banker depend on his own personal credit, not on the house in which the profits are made. A tenant would give no more than its intrinsic value for a house because inhabited by a banker who made £100,000 a year by his business, for such profits do not in any manner arise from the house, and could not be expected to accrue to any tenant who might take it; whereas the profits of the Railway Company are connected with the land on which the railway stands, and might be expected to arise to any tenant who should stand in the Company's situation.

With respect to the claim for what the appellants term the goodwill, that profit is attached to the premises themselves, and not to the business independently of those premises, and ought not, therefore, to be allowed as a deduction.

M. D. Hill, in reply.—The profits of this business come only from tolls or trade. Toll, therefore, is the only rateable profit. *Rex v. The Trustees of the Duke of Bridgewater* (a) is precisely in point. Here the rate is in respect of the use of the railway, strictly so called, that is, exclusive of stations, &c.: there the part of the rate in dispute was on the canal, exclusive of warehouses, wharfs, &c. Here the Company are carriers, and also toll-receivers from other carriers; there the trustees stood in exactly the same position: and the principle established by that case is, that the toll paid by strangers furnishes the cri-

(a) 9 B. & C. 68.

terion as to what part of the gross receipts, which come to the trustees as carriers, forms the basis of the rate. There is no doubt but that, if the Company were to exact a maximum toll upon the traffic of strangers, they must be held accountable to the parish officers for a maximum toll on their own traffic. Still toll would remain the criterion, and, that criterion being adopted, the same railway, while it yielded the same amount of toll, would always yield the same rate; but, according to the rule adopted by the sessions, it is not the *amount* of traffic which governs the rate; on the contrary, *that* is made to depend on the immaterial circumstance, of what proportion of the traffic belongs to the Company, and what to strangers: so that, if the present traffic all belonged to strangers, it would yield a rate of only 712*l.* 10*s.* per mile, while, if it all belonged to the Company, it would yield a rate of more than £1050 per mile. Suppose two Railway Companies to agree each to refrain from carrying on its own line, but to remove its engines and carriages to the line of its neighbour. According to the rule adopted by the sessions, the rates on each line would instantly drop down to the toll standard, although the traffic on each line should remain unaffected. It is true that, if the allowances made by the sessions were correct in number and amount, the two modes of rating would bring out the same result; but, as the toll expresses the whole payment for the use of the land, the discrepancy shews that the analysis undertaken by the sessions has been imperfectly performed.

Cur. adv. vult.

LORD DENMAN, C. J., now delivered the judgment of the Court.—This case of appeal against a poor-rate was argued in Michaelmas Term last, and again on a concilium in Hilary Term, and has been heard by all the members of the Court. Independently of certain questions of detail,

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which we will consider hereafter, the main arguments of the appellants were directed to shew that this case was distinguishable from the case of *Regina v. The London and South Western Railway Company* (a), in points which went to the principle of the judgment in that case ; while the respondents contended that the two cases were in principle the same, and that that judgment must govern the Court in this case.

It is necessary, therefore, in the first place, to compare the two cases ; if they shall be found to be different in material circumstances, the principle of that decision may lead to a contrary one in this ; at all events, that decision will not bind in the present case. If they shall be found to be substantially the same, it may be necessary to consider whether our own reflection, or anything urged in the argument, should induce the Court to depart from their former decision.

In that case the facts found (and it must never be forgotten that the propriety of a poor-rate can only be determined with reference to the facts found to be actually existing when it was made) were, that the Company were in the sole and exclusive occupation of the railway, warehouses, stations, and landing places, and, being so, were solely and exclusively carrying on a large business as carriers thereon. That, although their act had, under certain limitations, made the railway a highway for all the liege subjects, and given them under these a right to use it as such, either as carriers or for individual travelling, and in such case provided for the payment of tolls to the Company, yet that, in fact, no one having availed himself of this right, nor, as we thought, having the power of doing so conveniently or effectually, no tolls were in fact earned. To this state of facts we applied the established principle of

(a) Antè, Vol. 2, p. 629 ; 1 Q. B. R. 558 ; 2 G. & D. 49.

rating, that the rate is to be on the occupier in respect of the beneficial nature of his occupation; upon estimating which as to the amount, or, to put it in other words, in ascertaining how much net rent such and such an occupation may be expected to command, parish officers are to consider, not drily and only what would legally pass by the demise of it, but all the existing circumstances, whether permanent or temporary, wherever situate, however arising or secured, which would reasonably influence the parties to the negotiation for a tenancy as to the amount of the rent. We therefore thought it impossible, in that case, to separate the three or four miles of the railway within the respondent parish from the whole line running through many other parishes; or that whole line from the warehouses, stations, and landing places; or those again from the consideration of the peculiar convenience which the tenant would have for carrying on (as occupier) a lucrative business, if not the effective monopoly, which the provisions of the act appeared to give to the occupier for carrying on such a trade. What under the act was possible by law, what in point of fact might be in future, however near, we thought immaterial as to the principle, although very fit to be taken into account when making the calculation as to the quantum; but, in principle, the parish officers were to look to the actual state and value of the occupation.

In the case now under consideration, there are some facts entirely different from those which we have just mentioned. The case finds that other parties, as well as the appellants, exercise the right of being carriers over various parts of the railway, including therein that part of it which is within the respondent parish; providing for themselves, independently of the Company, (subject, however, to its control under the acts of Parliament), carriages, fuel, and all things necessary and convenient for the convey-

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ance of passengers and goods, and separate stations, and the needful branches into, and communications with the railway. These make profits of their carrying trade, as do the appellants, and pay them the tolls which they have fixed under the powers given them by their act.

Besides these, another class of carriers hire from the appellants engines, and the use of the stations, landing places, &c., but find their own carriages; these also make profit of their carrying trade on the railway, and pay toll, and a compensation for the use of the engines, stations, and other accommodations provided for them.

As the appellants receive tolls from these two classes of persons in respect of the goods and passengers conveyed by them on the railway, so they keep an account, as directed by their act, of the toll which would have been produced by them for the conveyance of goods and passengers not on their own account. These, added to the compensation above mentioned, form the total produce of the land which the Company, if not carriers or lessees of the railway, carrying on no trade upon it, would receive; and upon the aggregate of these alone, after due deductions, the Company contend the rate ought to be imposed.

We understand them, although it is not precisely so stated, to admit the principle of considering the whole line as entire, and to arrive at the exact sum at which they contend the rate in the respondent parish should be fixed, by a mileage division of the whole line; a principle very convenient in itself, and rightly adopted by consent.

It is unnecessary, after this statement, to point out the difference in fact between the two cases. But we cannot perceive how this difference bears upon the principle on which the rate is to be imposed, or which governed the Court in the former decision, which proceeded entirely on the then existing state of facts. Each of the two Companies must be rated in respect of the occupation of the

land ; one of them derives no benefit from that occupation, except by carrying on upon the land the business of conveying goods and passengers—the division of that profit into tolls and fares we think merely nominal ; the other, in addition to this mode of profitable occupation, also derives a profit from allowing others to carry goods and passengers on the land also ; and this latter profit is properly called toll. Still, in both, the inquiry must be the same,—what is the value of the occupation from whatever source derived ? In neither can the profits of trade, as such, be brought into the rate ; but, if the ability to carry on a gainful trade on land adds to the value of the land, that value cannot be excluded, merely on the ground that it is referable to the trade.

Suppose a house occupied by a private family to-day, which, having great advantages of situation for the purpose of trade, is turned into a shop to-morrow, and, in consequence, let for double or treble the former rent ; would not the rate be properly increased in proportion ? Could it be objected that to do so would be to rate the profits of trade ? Again, supposing the occupier were to let out different rooms to other persons carrying on the same trade as himself, and this mode of occupying was still to increase the value of the house to let, would this at all vary the principle on which he was rated, although it would increase the quantum ? Lastly, supposing that, instead of this species of under-letting being at the option of the occupier, all persons using the same trade had the right by some statute, under certain restrictions, to carry it on in the different rooms of the house, paying a large compensation to the occupier, would not the principle of the rate be still the same ? Would it be material to inquire how the occupation became more valuable, except for the purpose of making greater or less deductions, which the nature of the occupation would make just ? We may all remem-

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ber when the premises in Soho-square, now used as a bazaar, were occupied as a private residence; the present mode of occupation no doubt increases the rent; but whether one man, being the tenant, alone carried on the various trades now exercised there, or sold goods himself at part of the stands, and let out others, and so derived his profit in part directly from trade, in part from the rent paid him by the traders; or let out all the stands, and so earned no profit but from the rents paid him by the traders, the result would be in either case exactly the same. The overseers could only inquire what was the fair rateable value of a building so occupied; nor, as we have said before, could the inquiry be at all affected if the occupier of the bazaar held it under some statutable license, which compelled him to let his stands to all persons, paying certain rents, and submitting to certain regulations.

But it is said, that, in the case supposed, all is referable to the occupation under the supposed lease—that conveys the exclusive dominion, and thence flow entirely the means of making profit. We have, in truth, already given the answer to this; but it will be plainer if we observe, that there is a fallacy in confounding that which the lease conveys the legal title to, and that which it gives the lessee the means of doing or enjoying. No two things can be more distinguishable; and it is the latter which regulates the rent a tenant will give, and not the former. Suppose two estates of equal size, and in all respects of equal fertility, but one surrounded by good roads, a canal near to it, and a large market, and the other without these advantages; of course the rent and rateable value of the one would be larger than of the other, yet a tenant would take no more by the lease of one than he would by the other; the lease would give him no legal title, which he had not before, to use the roads, the canal, or the market. Or, suppose a more peculiar case: A., the owner and occupier of Black-

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pied by stations, &c. elsewhere rated; and sixthly, a sum per mile for the reproduction of rails, chairs, sleepers, &c.

These deductions taken together seem to us to include whatever is properly referable to the trade, and distinguishable from the increased value which that trade gives to the land. We do not now speak of the amount allowed under each item, and we are not competent to give any opinion on this point, which is properly for the sessions; but, if these are the proper heads of deductions, then the residue must represent the value of the occupation; and, if so, this alone is brought into the rate, and the profits of the trade are excluded. Accordingly, the sessions have found, as an inference from the facts, that the residue is the sum which a tenant from year to year might reasonably be expected to give for the railway and corporeal hereditaments now occupied by the Company in connexion with the railway, exclusive of the stations and other buildings rated separately, such tenant being assumed to have the same and no other power of using the railway, the same and no other advantages and privileges as the Company now possess. If the deductions exhaust that portion of receipts referable to trade, the inference of the sessions is fair. If the advantages and privileges which the Company possess are attributable to their occupation, and would pass with it, their assumption is well founded. We agree with them in both.

The appellants, however, contend that, even if the principle of the rate be fair, some reasonable deductions are omitted. We have used the sufficiency of the deductions made as a mode of trying the principle, but the objection of the appellants, now to be considered, is one of detail. The only instance which they specify and rely upon is, that an allowance ought to be and is not made for goodwill. We presume by this it is meant, that a person bargaining with the Company to become the yearly tenant of their railway, in the expectation of succeeding to their trade as a

probable consequence of succeeding to their occupation, would properly be called upon to pay them something for the goodwill of that trade, and that this would be in the nature of an outgoing and deduction from the profit. This objection appears capable of two answers : the first and decisive one is, that the purchase of good will implies that a trade is sold, that the Company are to be bound to surrender their trade to the lessee, and no longer to be carriers on the line ; but the calculation of the sessions proceeds on no such supposition ; all those special advantages, indeed, for carrying it on, which the occupation gives them whatever they may be, they must necessarily surrender ; but the moment they have leased the railway they would become part of the public, and have the right of carrying on their trade, retaining all the goodwill, with all those advantages which were carefully reserved to the public. Secondly, although the supposition of a tenancy is to be made, yet, what the incidents of the tenancy must be as to the actual terms and allowances must be determined, for the purpose of fixing the amount of the rate, by the actual state of things ; for this supposition of a tenancy is only a mode of ascertaining the existing value of the occupation to the existing occupier. Now here there is no tenancy in fact ; no goodwill is in fact paid for, and therefore no deduction ought in fact to be made on account of its price.

Again, it is contended that the existing facts of the case shew the unreasonableness of the rate. The carrying trade of the Company goes beyond their own line, upon the railways of other sets of proprietors, but the receipts arising from this have been excluded from the rate : this, it is said, is inconsistent. How can the profit which the same engine earns, by drawing goods over one mile, be of a different character from that it would earn in the same employment over the next mile ? So far from there being any inconsistency, it is necessarily involved in the principle on which the rate rests : that the distinction can be made,

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and has been made, is no slight proof of the soundness of that principle. The moment the engine leaves the railway of the Company, what it earns ceases to have any connexion with their occupation of the railway; it may and of course does increase the value of the occupation of that other line on which it then works, and will, of course, in the shape of toll, proportionately increase the rate which the occupier will pay; but, if it were allowed to swell the charge on the Company, it could only do so in respect of the profits of the trade; and this our principle excludes.

But it is said, lastly, that this principle works injustice between the Company and the other corporations or individuals who carry upon their line—their engines and their trade are said to pay nothing to the poor-rate directly, and indirectly only in respect of their toll, which may be supposed to be calculated so as to bear its own rate; whereas the Company pay on their tolls and on their fares. Colour is given to this objection from the fact, which might seem to explain it, that the Company fill two characters, the other party one only; but the proper answer is a denial of the fact,—the Company do not pay, directly or indirectly, on their fares; they pay only on the increased value of their occupation of the land, occasioned by whatever circumstances.

If a trader should underlet to a lodger a room in his house, in which he derives the most profitable trade imaginable, such lodger would pay no poor-rate at all, but as the trader would proportion the rent at which he let the lodging to the advantages which such lodger derived from them, the total rent which a trader would pay, and the rate which could be imposed on him, would be proportionably increased; but could he complain of any injustice, or say that he carried on his own trade in the rest of his house to disadvantage, because in his rate the value, which the trade so carried on in the residue gave to the occupation, was also taken into account in fixing the quantum of

the rate? Yet those parties who carry on a trade on the Company's line are in effect but in the nature of lodgers, or parties enjoying a profitable easement on the line, and, by the consideration they pay, increasing its general value.

In the examination which the case has compelled us to make, we have been necessarily led into a reconsideration of the principles on which the decision in the case of the South Western Railway Company proceeded. That decision was not directly impugned; but the distinction of facts relied on has appeared to us on examination so unsubstantial, that it was necessary, in order to a decision against this rate, to examine the principles on which that was upheld; and in a matter of such vast importance and such apparent novelty, where, too, the decision of this Court cannot be reviewed in a Court of error, we were not unwilling again to examine the question.

Upon the whole, we are satisfied with the decision of the sessions. It appears to us founded upon a just application of established principles, in accordance with many decided cases, and conflicting with none. Our judgment therefore will be for the respondents.

Order of sessions confirmed (a).

(a) See the next case.

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1846.

COURT OF QUEEN'S BENCH.

*In Hilary Term, 1846.**Jan. 22nd.*THE QUEEN *v.* THE GREAT WESTERN RAILWAY
COMPANY.

The Great Western Railway Company are owners and sole occupiers of a line of railway, 118 miles in length, and are also lessees and sole occupiers of two branch lines, 44 and 18 miles in length respectively, issuing out of the main line. Upon all

these lines they carry on exclusively a large trade as carriers, the receipts of which from the branch lines alone, if set against their expenses and rent, would make the occupation of them, in fact, a losing concern; but this occupation increases the traffic upon the main line.

The mode adopted by the parish officers in rating the railway was as follows:—They took the gross receipts per mile in the respondent parish. From this they deducted a mileage proportion of the expenses, and of the interest and tenant's profits on the plant of the whole line railway, and rated the Company on the residue.

Held, that, among the above deductions, an allowance ought to be made in respect of the depreciation and wear and tear of the rails and sleepers, the solid timber and iron work of the main line, if paid out of the income of the Company, and charged as an item of annual expenditure before the division of profits, under s. 145 of their act, (5 & 6 Will. 4, c. cvii); but not if paid out of their capital.

And also for the rateable value of buildings appurtenant to the main line and branches, rated or rateable elsewhere than in the respondent parish.

But that no allowance should be made for interest on the sum expended in procuring their act, raising their capital, and other original expenses.

Nor for additional parochial assessments which may become payable in consequence of the recent decisions of this Court on the subject.

Nor for the actual loss on the branch lines.

Quære, whether a deduction ought not to be made for all or part of the income tax, which, by 5 & 6 Vict. c. 35, Schedule (A.), No. 3, is to be charged, in the case of railways, on the profits of the preceding year, in respect of the *property* thereof.

The reasonableness of the percentage to be deducted for tenant's profits is a question entirely for the sessions; but when the value of the plant has become diminished, the percentage should be calculated on the present, not the original value: such deduction, however was not allowed to be made in this instance so as to increase the present rate.

at the sum of 3093*l.* 15*s.*, the said two rates being respectively at the rate of £1200 and £1500 per mile, against both of which rates the said Company appealed ; and at the hearing of the said appeals at the Easter quarter sessions for the county of Berks, 1843, the court confirmed the said rates, subject to the following case :—

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The Great Western Railway Company are established by an act of Parliament passed in the fifth year of King William the Fourth, intituled “ An Act for making a Railway from Bristol, to join the London and Birmingham Railway near London, to be called the Great Western Railway, with branches therefrom to the towns of Bradford and Trowbridge, in the county of Wilts,” and three other acts of Parliament respectively passed in the sixth year of William the Fourth, and first and second years of her present majesty Queen Victoria. Copies of these acts, and also of the two half-yearly reports made at two general meetings of the said Company, held respectively on the 18th day of August, 1842, and 10th day of February, 1843, which accompany this case, and are admitted to be correct statements, are to be deemed to constitute part thereof, and may be referred to by the Court or either party at the hearing thereof.

Under the power contained in those acts, or one of them, the Company have completed a line of railway from Paddington, in the county of Middlesex, to Bristol, being a length of 118 miles, and this railway, for two miles and a sixteenth of a mile thereof, passes through the parish of Tilehurst.

The Great Western Railway Company, in order to increase the traffic on their line, became and were, before and at the making of the rates, lessees of a branch line from Bristol to Taunton, in the county of Somerset, for a term of years, on the terms of paying to the proprietors thereof, for the use of the whole of the said branch line, being a distance of forty-four miles, including the right to use the

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stations, and the right of taking all rates and tolls for the conveyance of passengers, cattle, and goods, the sum of £50,000 per annum.

In like manner, and for the same purpose, the said Company became lessees of a branch line from Swindon to Cirencester, being a distance of eighteen miles, and for the use of which, including all the rights and privileges above mentioned, the said Company, at the making of the rates, were liable to pay to the proprietors thereof a rent of £17,000 per annum.

By reason of the incomplete state of the branch railways, the whole length of permanent way worked by the Great Western Railway Company, both as proprietors and as such lessees, amounted during the current year of rating to 175 miles only.

The Company, as such lessees of the two last-mentioned lines, were, in fact, at the time of making the rates, incurring annually a loss of £10,500 over and above the actual receipts in respect of those two branch lines, the rents exceeding by that sum the profits earned on those lines; and this loss was incurred solely for the purpose of benefiting by the increased traffic occasioned by those lines on the Great Western Railway.

The appellants do not themselves maintain or repair the above branch railways, or the buildings connected with them; but they pay rates in respect of them, and they carry on the business of carriers jointly on the whole of the united lines as one entire concern.

The Company, since the passing of their act and the completion of the railway, have not only taken certain tolls authorised by the said act, but they have also provided the locomotive power and carriages, and have themselves conveyed upon all the three railways, passengers, cattle, and goods, for hire, in addition to the said rates and tolls; and, in point of fact, the Company, since the completion of the said railways, have been in exclusive occupation o

the said railways as carriers, no other carriers having availed themselves of the privileges conferred by the act, of providing carriages or power independent of the Company.

There is no station or building in Tilehurst, nor is there any extraordinary profit or expense in the repair or maintenance of the way in that parish; but the expenses may, for the purpose of these rates, be fairly taken as proportionable to the length in the parish as compared with the whole length of the united lines.

The different stations and buildings throughout the lines are to be considered as rated separately from the railway.

The following are the detailed particulars of the mode in which the rate allowed by the court of quarter sessions was ascertained by the parish officers.

The gross receipts of each mile in the parish of Tilehurst were ascertained to be £3680.

The expenses of the whole line of the three railways, during the period to which the rates apply, amounted to the sum of 257,205*l.* 14*s.* 11*d.*, comprised under the following heads:—

	£	s.	d.
1. Maintenance of way	49,643	6	5
2. Locomotive account, viz. coal, coke, repairs, wages to drivers, firemen, &c., oil, tallow, and all other incidental expenses	74,725	9	0
3. Carrying account, viz. wages to guards and conductors, police, messengers, and porters, clothing, repairs of carriages, stores, &c.	60,714	15	2
4. General charges, viz. superintendents' and clerks' salaries, advertising, printing, stationery, and sundries, including travelling expenses	23,126	2	11

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5. Disbursements for repairs and alterations of stations and buildings connected with the railway	1,682	6	8
6. Compensation for fire and other accidents, and other annual returns and allowances connected with the trade	1,536	10	0
7. Government duty on gross receipts from passengers	25,783	4	6
8. Rates and taxes of all kinds assessed on the Company in respect of the property, and actually paid (other than the property tax)	11,340	14	8
9. Direction and office expenses	8,643	5	7
	<hr/> £257,205 14 11		

10. Adding to this the annual depreciation of the plant or moveable stock necessary for working the whole line of railway, together with the branches, which amounted to £20,000 a year, the total expenses amounted to 277,205*l.* 14*s.* 11*d.*

The proportionable expenses of one mile, being $\frac{1}{17\frac{1}{2}}$ th of the whole, £1584.

The value of the whole plant or moveable stock, at its first cost, was about £580,000.

On this sum the respondents allowed £5 per cent. as interest on that stock	29,000
£10 per cent. as tenant's profits, including the profits of trade	58,000
	<hr/> £87,000

The portion of this, in respect of one mile in Tilehurst parish, (being $\frac{1}{17\frac{1}{2}}$ th of the whole), £497.

From the gross receipts for each mile in Tilehurst, they then deducted the proportion of the above expenses charge-

able on it, and the portion of the above percentages in respect of it, thus—

Gross receipts	.	.	.	£3680
Deduct expenses	.			£1584
Interest and profits	.			497
			—	2081
				£1599

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The balance of £1599 was taken by the respondents, and found by the sessions to represent the net rateable value of each mile of the railway in Tilehurst parish; and the sessions found the above amounts and sums to be correct, but submit to the judgment of this Court the principle on which the calculation is founded, and the propriety and sufficiency of the deductions.

They further state, that the percentage, mentioned above as tenant's profits, is not to be taken as the actual profits of the Company from trade, the whole of their receipts and profits being in fact derived directly from their trade; but the sessions find that percentage to include such a reasonable profit of trade as would induce a lessee, who carried on the like business under the same circumstances, to forego the rest, and to pay it as rent.

The appellants contended, that, assuming the estimate of the respondents to be founded on just principles, the following additional deductions ought to be made.

1. The buildings, stations, shops, sheds, and other erections appurtenant to the Great Western Railway line alone, rated or rateable separately from the railway, and necessary for the profitable enjoyment of it, may be taken, for the purposes of these rates, as worth £35,000 a year, rateable value at the time of making the rates; and the appellants claim a portion of this sum to be deducted from the receipts in Tilehurst parish.

If to be taken as $\frac{1}{118}$ th of the whole, £296 per mile.

If to be taken as $\frac{1}{78}$ th of the whole, £200 per mile.

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In like manner, the annual value of the buildings, stations, &c., on the two branch railways above mentioned, may be taken at £10,000 per annum; and if the united value of these buildings in all the three railways is a proper deduction, then the deduction (being $\frac{1}{175}$ th of the whole) is £257 per mile.

2. The appellants further claimed a deduction in respect of depreciation and wear and tear of rails and sleepers, being the solid timber and iron work of the Great Western Railway alone.

This expense is not included in the item of "maintenance of way" above mentioned, nor has it been found necessary as yet, by the Company, to appropriate any annual fund for this purpose, because this expense has hitherto been taken from the capital, and not deducted from the revenue.

But such deduction, if proper, is to be taken at £20,000 a year, in respect of the whole of the Great Western Railway, exclusive of the branches.

If divided by 118, the amount per mile is £169.

If divided by 175, the amount per mile is £114.

3. The appellants further claim the following deductions:—Five per cent interest on £420,000, being the outlay in forming the Great Western Railway Company, obtaining the act of incorporation, raising the capital, and other original expenses,—£21,000 per annum.

4. Income tax paid by the Company, in pursuance of 5 & 6 Vict. c. 35, amounting in the whole to £10,000.

5. Additional parochial assessments, not actually paid, but which will be payable in consequence of the recent decisions of this Court on the rating of railways,—£12,000 at least.

The last item includes the rates on all the three railways occupied by the Company. It has not yet been paid, nor can it be clearly ascertained, until the deductions are settled in each rate.

6. The annual total loss on the two branch lines already referred to,—£10,500.

The appellants further contended, that, instead of ascertaining the tenant's profits by a percentage on the original value of the plant or moveable stock, they will be more correctly represented by a percentage on the gross receipts, and that for that purpose, £15 per cent. on £3680 should be deducted, viz. £552.

It was stated on the part of the respondents, that the plant, or moveable stock of the Company, was, at the time of making the rate, depreciated in value; and the sessions find that in fact it was so depreciated, and was then worth about £500,000, and not the sum of £580,000 as above stated; and if any of the deductions demanded by the Company were allowed, then the respondents claimed to take such reduced value as the sum upon which interest and tenant's profits should be calculated; that is to say, £15 per cent. on this sum,—£75,000; and the portion of this in respect of a mile in Tilehurst,—£428.

The sessions find the several sums and particulars above mentioned correct in amount for the purposes of the present case, and they refer to this Court the propriety and principle of all or any of the above deductions.

The rates are to be confirmed, quashed, or amended, or the appeal remitted for further inquiry, according to the opinion of this Court upon all or any of the above points.

Whateley, Tyrwhitt, and Bros, in support of the order of sessions (a).—The principle upon which railway property is to be rated towards the relief of the poor is clearly established by *Regina v. The London and South Western Railway Company* (b), and *Regina v. The Grand Junction Railway Company* (c). The rateable value of the railway must be ascertained according to the provisions of

(a) Nov. 13th, 1844, before Lord Denman, C. J., *Williams, Coleridge, and Wightman, Js.*

(b) *Antè*, Vol. 2, p. 629; 1 Q.

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(c) *Antè*, p. 1; 4 Q. B. R. 18; 1 D. & M. 237.

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the Parochial Assessment Act, 6 & 7 Vict. c. 96, s. 1, “upon an estimate of the net annual value of the several hereditaments, that is to say, of the rent at which the same might reasonably be expected to let from year to year, free of all usual tenants’ rates and taxes, and tithe commutation rent-charge, (if any), and deducting therefrom the probable average annual cost of the repairs, insurance, and other expenses, if any, necessary to maintain them in a state to command such rent.” The question submitted to this Court is, whether the following deductions claimed by the appellants come within the terms of that statute.

1. The appellants claim a deduction in respect of stations, sheds, &c., on the railway, but not in the respondent parish. A claim for stations, &c., out of the respondent parish, was allowed in *Regina v. The Grand Junction Railway Company* (a); but, in fact, this is the first time the question has been raised; for, upon looking at that case it will be found, that there was no decision by the sessions on that point. It was never discussed there. The claim was allowed by the parties, and, therefore, the court did not dispute it. The profits made in each parish must be taken as the basis of the calculations. The case finds that there is no railway station in the respondent parish, and, therefore, this parish will be entitled to a greater amount of rate than other parishes in which stations are situate. It is now established by numerous cases, that a canal is to contribute to the relief of the poor in each parish through which it passes, in proportion to the profit derived from the use of the land occupied in that parish. If the profits arising from a given quantity of land vary in different parishes, the rate must vary in the same proportion: *Rex v. Palmer* (b), *Rex v. Kingswinford* (c), *Rex v. The Trustees of the Duke of Bridgewater* (d), *Rex v. Lower Mitton* (e). A

(a) Antè, p. 1, 4 Q. B. R. 18; 1 D. & M. 237.

(b) 1 B. & C. 546.

(c) 7 B. & C. 236.

(d) 9 B. & C. 68.

(e) Id. 810.

deduction like the one now claimed by the appellants has not been admitted in rating canals, and there is no ground either in principle or practice for allowing it.

2. The appellants claim a deduction in respect of depreciation and wear and tear of rails, &c., being the solid timber and iron work of the railway.

This is an occupier's tax. The rate is to be levied on the amount of rent which a tenant would give from year to year. The tenant of a house is not required to lay by a fund for rebuilding, nor can he claim a deduction for such purpose. A deduction is already allowed for the ordinary repairs of the works, and the appellants cannot claim to be allowed for present ordinary repairs as well as future permanent repairs. This claim appears to be founded on a passage in the judgment in *Rex v. Tomlinson* (a), where it is said, "some portion of rent ought to be set apart to form a fund for repairing or rebuilding when necessary." But that case will not be found to be an authority for that position. It is followed by *Rex v. Lower Mitton* (b) and *Regina v. The Cambridge Gas Light Company* (c). The result of those cases is, that the deductions contemplated are not for the renovation of the works, but merely such as would enable a tenant to keep the works in repair, so as to be available to command such yearly rent. In *Rex v. The Hull Dock Company* (d), the property of the Company was held rateable, although the expenditure in repairs, during the period for which the rate was made, exceeded the amount of the duties received. In *Rex v. Woking* (e), the Court refused to allow to the trustees of a navigation a deduction in respect of sums paid by way of compensation to certain mills which had been injured by the works. The meaning of rack-rent, as applicable to the rateability of tithes, came fully under the consideration of the Court in *Regina v. Capel* (f). Besides, in this

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(a) 9 B. & C. 163.

(b) Id. 810.

(c) 8 A. & E. 73.

(d) 5 M. & S. 394.

(e) 4 A. & E. 40.

(f) 12 A. & E. 382.

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case, the depreciation is not charged in the half yearly accounts of the Company as an item of annual expenditure, which by their act, 5 & 6 Will. 4, c. cvii, s. 145, they are bound to do before making a division of the profits (a).

3. They claim a deduction for expenses incurred in obtaining the act of incorporation, &c. This is a novel demand, and one that will not be sanctioned by the Court. In estimating the net annual value of landed property, it has never yet been suggested that a deduction should be made in respect of expenses incurred in obtaining deeds of conveyance.

4. The income tax is, by the statute 5 & 6 Vict. c. 35 (b),

(a) Sect. 145 enacts, "That the Company shall cause a true and particular account to be kept, and to be made up twice in every year, viz. on 30th of June and 31st of December, of the money received by or for the use of the said Company by virtue of this act, and of the charges and expenses attending the making, maintaining, and carrying on the undertaking, and of all other the receipts and expenditure of the said Company up to those periods respectively, which account shall be laid before the half-yearly general meetings of the said Company hereinbefore directed to be held in the months of August and February respectively," &c.

Sect. 146 empowers the Company, at any half-yearly general meeting, &c., to declare and make a dividend out of the clear profits of the said undertaking: Proviso, that no dividend shall be made exceeding the net amount of clear profit at the time being in the hands of the said Company, nor whereby the capital of the said Company shall in any degree be reduced or impaired, &c.

(b) By the 5 & 6 Vict. c. 35, s. 1, it is enacted, (Schedule A.), that "for all lands, tenements, and hereditaments, or heritages, in Great Britain, there shall be charged yearly, *in respect of the property thereof*, for every 20s. of the annual value thereof, the sum of 7d."

(No. 3). "The annual value of all the properties hereinafter described shall be understood to be the full amount for one year, or the average amount for one year, of the profits received therefrom within the respective times herein limited," &c.

3. "Of iron works, &c., railways, and other ways, &c., and other concerns of the like nature, from and arising out of any lands, tenements, hereditaments, or heritages, on the profits of the year preceding."

Schedule (B.). "For all lands, tenements, and hereditaments, in England, there shall be charged yearly, *in respect of the occupation thereof*, for every 20s. of the annual value thereof, the sum of 3½d."

a landlord's tax, being, in the case of railways, chargeable, under Schedule A, in respect of the *property* thereof, not of the *occupation*, under Schedule B, and, therefore, cannot be charged on the tenant, and deducted in this case.

5. Additional parochial assessments not actually paid, but which will be payable in consequence of the recent decisions of this Court on rating of railways. These sums have not been paid, nor have they been ascertained. Each rate is calculated according to existing circumstances, but at present there is no ground for claiming this deduction.

6. The annual total loss on the two branch lines of railway. These two branch lines, which communicate with the Great Western Railway, were taken by the appellants, and because they are an unprofitable speculation they claim to deduct such loss. The parish officers can only rate the visible property in the parish, they cannot inquire whether a loss is sustained in some distant portion of the line; therefore, in ascertaining the rateable value of property in this parish, the fact, that the Railway Company have made a bad bargain with respect to two branch lines out of the parish, cannot be considered. Property is liable to be rated though no profits are made: *Rex v. Parrot (a)*, *Rex v. Mirfield (b)*, *Rex v. Attwood (c)*, *Rex v. The Hull Dock Company (d)*.

7. As to the tenant's profits, the rule must be adopted which has been laid down in *Regina v. The Cambridge Gas Light Company (e)*, *Regina v. The London and South Western Railway Company (f)*, and *Regina v. The Grand Junction Railway Company (g)*.

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(a) 5 T. R. 593.

(b) 10 East, 219.

(c) 6 B. & C. 277.

(d) 5 M. & S. 394.

(e) 8 A. & E. 73.

(f) Antè, Vol. 2, p. 629; 1 Q. B. R. 558; 2 G. & D. 49.

(g) Antè, p. 1; 4 Q. B. R. 18; 1 D. & M. 237.

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proper criterion in rating railways; the gross receipts form the basis of the rate. The appellants should be allowed a deduction for stations, buildings, &c., appurtenant to the railway. These stations are found to be necessary for the occupation of the railway. A mileage receipt is found to be the proper method to be adopted. The receipts arise from the whole railway. The whole receipts should be divided mile per mile over the whole railway, and by that means the whole fund is exhausted. The expenses of stations, &c., are deducted on the same principle that allowance is made for the expense of procuring a supply of water to a canal: *Rex v. The Oxford Canal Company* (a). The stations form part of the undertaking, and are essential to the general working of the railway, so as to enable the Company to obtain the fund out of which the rate is levied. The sum stated to be received in the respondent parish could never have been received unless stations had been erected on other parts of the line. The stations are *per se* a burden, but the rails in conjunction with the stations enable the Company to raise their funds.

2. In *Rex v. The Hull Dock Company* (b), Lord Ellenborough, C. J., said, "the Company should have laid by a fund to meet the expenses of the undertaking." These appellants must be treated as if they had laid by a fund for repairs and renewal. In estimating the amount of rate for the present year, the repairs that will be required at some future time must be taken into consideration; "the probable average annual cost" must be taken *communibus annis*. In *Rex v. Tomlinson* (c), Bayley, J., says, "some portion of the rent ought to be set apart to form a fund for repairing or rebuilding when necessary; in other words, to maintain or reproduce the subject of occupation." The same principle was adopted by the Court in *Rex v. Lower Mitton* (d). All expenses must be allowed so as to keep the rails in a

(a) 10 B. & C. 163.

(b) 5 M. & S. 394.

(c) 9 B. & C. 163.

(d) Id. 810.

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state to command such rent. Repairs, in the ordinary sense of the word, are not adequate to meet all the outgoings requisite to command the rent; and unless a fund is set apart, a day will come when all the profits will be absorbed in reconstructing the railway, and then the case will be similar to that of the Hull Dock Company, and the appellants will receive the same answer from the Court which was received there.

3. An act of Parliament for such a Company is as necessary as a carriage or an engine, and therefore a deduction should be made on that head. These expenses become necessary, in order that the undertaking may be carried out and perfected.

4. The income tax is not only payable by the landlord, but by the tenant. This tax is a payment which must come out of the gross receipts of the Company.

5. These rates, for which a deduction is claimed, are said to be all *in prospectu*. They must necessarily be so, otherwise a new assessment would be requisite every quarter, an enormous evil. It must be taken into the account what may reasonably and probably be paid hereafter.

6. The loss sustained on the branch lines is an expense incurred by the Company in bringing additional traffic on the main line of railway. The general traffic is increased by means of these branch lines, and, therefore, the Company are entitled to a deduction. It is not contended, as in *Rex v. Parrot (a)*, that the branch lines are unprofitable; they are profitable as contributing towards producing the profits made throughout the line of railway, and consequently in the respondent parish. In some canals there are branch cuts, not navigated or navigable, but which are used to bring water for the service of the main line. The annual cost of such cuts would

(a) 5 T. R. 593.

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be a charge upon the profits of the main line. Here that charge consists of the balance of profit and loss on the branch lines; that balance being a loss, becomes a necessary deduction from the gross receipts of the main line, which must be made before the rent can be brought out. *Rex v. The Oxford Canal Company (a)*.

7. The calculation should be made on the whole plant, and not on the value of the plant, deducting the depreciation of the machinery, &c.

Cur. adv. vult.

LORD DENMAN, C. J., now delivered the judgment of the Court.—This case has stood over for some time from the wish to afford it the fullest consideration; and as our decision must be governed by the principles laid down in the two cases of the South Western and Grand Junction Railways, it may be convenient briefly to recapitulate what was in those cases decided; not that they introduced any new principle into the law of rating, but because the circumstances under which the established principles were applied were somewhat novel. We there laid down, that although profits of trade carried on by the occupier of land could not be made directly the subject of the rate assessed in respect of such occupation, and that the value of the occupation alone was the proper subject, yet in that value was to be included whatever at the time formed part of it, whether permanently or not, from whatever source derived; and therefore, of course, not less so, although derived, in any proportion, from the fact of the trade being so carried on upon it. Further, that although the sum to be sought was that which, after all due deductions made, a tenant might be found to give, by way of rent from year to year, in order to be placed as occupier in the same position as the party rated, yet this was to be sought, not

(a) 10 B. & C. 163, 177.

by drily considering what rent would be given for so many miles of railway as happened to be in the rating parish, apart from all the actual coexisting circumstances, but by including in the consideration all such as would necessarily attend upon the occupation under the demise, and which would influence the tenant's mind as to the amount of rent which he would give. In the application of these principles, the practical difficulty for those who assess the rate, in cases of such complication as railways often present, will be, to distinguish accurately between that which is properly referable to the trade alone, and that increase of value which the carrying on of the trade upon the land gives to the occupation of it.

The case of *Regina v. The Grand Junction Railway Company* (a) presented many circumstances the same as exist in the case now before us. We thought the parish officers there had successfully met the difficulty. We are now to examine the rate stated in this case, only, however, as to its principles, and so much of its details as involve the principle; beyond that, especially as to the accuracy of calculations, the question must be for the sessions alone.

We have here a Company sole occupiers of the line of which they are owners, and of this the land in respect of which they are rated forms a part; they are also sole occupiers, as lessees, of two branch lines, both issuing out of the line first named. Upon all these lines they carry on exclusively a large trade as carriers, the receipts of which from the branch lines alone, if set against their expenses and rent, would make the occupation of them, in fact, a losing concern; but this occupation increases the traffic upon the main line, and for the sake of this the Company are content to sustain that partial loss. In order to ascertain the rate, the course pursued has been to take the gross receipts per mile in the respondent parish; and

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(a) Antè, p 1; 4 Q. B. R. 18; 1 D. & M. 237.

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this sum is not in dispute. The deductions to be made from this are calculated upon mileage proportion of all the expenses and outgoings, treating the whole three lines as one entire line in all particulars in which the appellants are at all chargeable; and we do not understand this mode to be objected to; setting the proportions of this per mile against the gross receipts per mile, the residue has been taken as the rateable value per mile. We are then to see whether these deductions include all such as ought to be made in an ordinary occupation, exclusive of trade, and also of all such matters as are distinctly referable to the trade only, and do not enhance the value of the occupation; if so, the principle of the rate is right. Whether sufficient in amount under each head has been allowed, it is not for us to determine.

Ten things are first stated, which are intended to represent the annual expense of keeping in repair the ways, stations and other buildings, and rates and taxes, other than the property tax, payable on them; expenses of directing and carrying on the business, the government duty on passengers, and some incidental charges connected with the trade. Thus far, the outgoings allowed for are annual. The appellants here first object, that, besides an allowance for merely annual repairs, they are entitled to one in respect of the depreciation and wear and tear of the rails and sleepers, the solid timber and iron work of their own principal line; and this, although hitherto they have not charged such expenses against their income, but defrayed it out of their capital. In the case of the Grand Junction Railway such an allowance was conceded; it is now disputed, and the circumstances, therefore, must be examined. In themselves, perhaps, repairs of the kind now under consideration are not to be distinguished in principle from what the case denominates "maintenance of the way," and which the appellants include under their annual expenses; and although not called for in any particular year, yet if, in the cer-

tainty that the charge would in a given time accrue, a proportionable sum has been actually deducted from the annual revenue, we see no reason why an allowance should not be made for it, as much as for the annual repairs actually done in the course of the year ; but as, in the case of these last, the fact of repairs being needed would not entitle to a deduction unless they were done, and the charge incurred, so in the present case, as no deduction has been made from the revenue, it appears to us, therefore, no allowance can be made. For their own purpose, and, as suggested in argument, in violation of their act of Parliament, the Company have chosen to defray the amount, trifling, perhaps, at present, out of their capital ; so that they have given to that which they now seek to consider as tenant's repairs the character of landlord's improvements, the capital expended for which would swell the rateable value of the land, but would not be allowed in the rate.

The appellants next claim to deduct the rateable value of buildings appurtenant to their own line, and also to the branch lines respectively, as rated or rateable elsewhere than in the respondent parish, separately from the railway itself : this also is an allowance which was conceded in the case last referred to, for it would be hardly worth while to distinguish between those rated and rateable only, and we have no means of drawing the distinction in fact. And it is to be remembered, that the respondents properly treat the whole line, the whole profits, and the whole outgoings as entire ; and then the question is, whether there is any distinction between this and other outgoings necessary to earning a profit by which the rateable value of the land in the respondent parish is enhanced. It seems to us that there is none ; and, if so, we agree with the learned counsel for the appellants, that, in principle, it is indifferent whether the stations be in the same parish or at a distance.

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The appellants claim, thirdly, an allowance for £24,000, yearly interest on the sum expended in forming their Company, obtaining their act of Parliament, raising their capital, and other original expenses. For this there is no foundation. These expenses have no connexion with the rateable value of the railway; they might all have been incurred had no railway ever been constructed: as well might the purchaser of an estate, who had borrowed money after an expensive litigation as to the title, claim to deduct his interest and expenses from the poor-rate on land in his occupation. They neither add to the value of the occupation, nor are in any way necessary to make it up.

The appellants then claim to be allowed in respect of £10,000 paid by them as income tax under the 5 & 6 Vict. c. 35. This claim is very shortly and unsatisfactorily stated. In respect of what the payment has been made, we are not informed on either side; the arguments respecting it were short, the respondents treated the claim as made in respect of the charge on property in hand payable by the owner, the appellants claimed it in respect of the charge on the occupation payable by the tenant; and, to this extent at least, it does not strike us that there is any reasonable distinction between this and any other outgoing chargeable upon the tenant, which would certainly affect the amount of the rent he would be willing to pay.

The fifth claim is to be allowed for such additional parochial assessments as may become payable—it is not said when or where—in consequence of the recent decisions of this Court; upon which we will only say we think the court of quarter sessions would have been well justified in refusing to permit this item to stand as part of the case.

In the sixth place, the appellants claim to be allowed a deduction in respect of their loss on the two branch lines before referred to. We think this cannot be allowed. If the rate in question had been imposed on land forming

any part of the branch lines themselves, it is clear that the circumstance of receipts not equalling the rent—in other words, that the line was worked at a loss—would not have affected the rate; the occupation would still have been beneficial, in the sense in which that word is used for the purpose of assessing the rate; and the rent, which, from whatever motive, the appellants found it worth their while to give, would have regulated the amount. This is not that case; in the way in which it is sought to make this expenditure bear on the rates assessed on any part of the main line, it is more like money laid out in the way of improvement, for which no deduction should be made. If the lessee of a coal mine were to open roads to the adjoining land, rented under a separate demise, in order to facilitate the access of customers to the mine, and so increase its profits, the expense of such roads would certainly not be outgoings to be allowed for in the rate.

Two more questions are stated: the first as to the mode of ascertaining the tenant's profits in order to their deduction from the rateable value. The respondents have taken the original value of the plant or moveable stock, and allowed £10 per cent. upon it for this profit, as well as the profit of trade. The appellants say, that the more correct mode would be to ascertain them by a percentage upon the gross receipts, and claim to have £15 per cent. deducted from this on that account. We are very unwilling to withhold our aid in settling questions for the quarter sessions of such novelty and difficulty as railway rating must often bring before them; but we ought not to go beyond our province, and so perhaps mislead them. This question involves no principle of law, and we decline to answer it.

The last is only raised by the respondents provisionally, in case any of the deductions claimed by the Company should be allowed by us. But this has been done:—in ascertaining the tenant's profits, they have calculated a per-

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centage on the original value of the moveable stock. The sessions have found, at the time of the rate being made, the value had become less by £80,000; and the respondents contend that the percentage should properly be paid on the smaller sum. This seems to us correct: they are to make the rate from year to year, or for whatever shorter period, conformably to the facts as they exist at the time of making the rate. They may not know, or have any means of knowing, what the value was originally, or in any former year. If, at the end of five or ten years, they are to be driven back to the original value, they may be equally required to ascertain it after an interval of a century. No hardship is inflicted on the appellants by this: they may, and they ought, as prudent owners, to keep up the stock at its original value; and in this very case they have claimed a deduction for doing so. If that claim was properly made, the original and present value would be the same. Although, however, we thus answer this question in favour of the respondents, they cannot avail themselves of the decision so as to increase their assessment beyond its present amount.

The consequence of the several decisions we have come to will be the amendment of the rate in one or two particulars; but, as the sums are ascertained by the sessions, this may be done, we presume, by counsel, without remitting the case back again.

Rate amended accordingly.

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BEFORE V. C. OF ENGLAND.

Ex parte MADON, re THE GREAT WESTERN RAILWAY
COMPANY.

Jan. 18.

THIS was the petition of the Rev. S. Madon, the vicar, and of the Provost and Scholars of Oriel College, Oxford, the patrons, of the vicarage of Twiverton. It stated, that, under the provisions of the Great Western Railway Act (*a*), the Company had purchased and taken the house and offices, garden and orchard, attached to the

The Great Western Railway Company were, by a clause in their act, compelled, if they took any part of the glebe belonging to the vicarage of Twiverton,

to take *the house* also; and the vicar and patrons for the time being were empowered, on petition by them to the Court of Exchequer, with the consent of the ordinary, to lay out any part of the purchase-money in purchasing or erecting a new vicarage-house, but the act did not declare by whom the costs of getting the money out of Court for this purpose should be defrayed:—*Held*, that the Railway Company were not liable for the “costs, charges, and expenses” of getting the money out of Court for the purpose of *building* the new vicarage-house, and that the sections of the act generally declaring the Company liable to the costs, &c. of money taken out of Court apply only to the cases in which such money is to be re-invested in the manner *specifically* declared by the acts of Parliament.

(*a*) 5 & 6 Will. 4, c. cvii, s. 85, enacts, “that the said Company shall not be at liberty to purchase any part of the glebe of the said vicarage of Twiverton, otherwise Tiverton, or of the said paddock and garden so claimed to belong to it, without purchasing the vicarage-house and offices, garden, and orchard attached thereto, and also the said paddock and garden, &c., and that any part of the compensation to be payable to the vicar for the time being of the said parish of T. for or in respect of such vicarage-house, offices, garden, and orchard as may be taken from that vicarage

for the purposes of this act, may, on petition to the Court of Exchequer by the vicar and patrons for the time being of that vicarage, and with the consent of the ordinary for the time being of the diocese, be laid out in purchasing, or in enlarging, or otherwise rendering any house fit for, or in erecting a new vicarage-house on any lands being now, or being at that time, by purchase, part of the glebe of the said vicarage, &c., to be approved by the vicar, patrons, and ordinary for the time being of the same vicarage,” &c.

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vicarage of Twiverton, for the purposes of their railway, and that the purchase-money for the same had been paid into the Bank of England, in the name of the Accountant-General, "to the account of the Vicarage of Twiverton."

That part of the money had been laid out in the purchase of a piece of freehold land. That the petitioner S. M., had, with the consent of the other petitioners, the patrons of the vicarage, and of the ordinary of the diocese, under the powers given him by the act, lately erected a new vicarage house on part of the lands so purchased as aforesaid; and the petition prayed that the sum of 1488*l.* 14*s.* 8*d.*, Bank Annuities (residue of the purchase-money), might be sold and paid, together with the dividend then due thereon, to the petitioner, S. M., to defray the expenses of building the vicarage house; and that the said Railway Company might pay to the petitioners, and to the ordinary of the diocese of Bath and Wells respectively, their respective costs, charges, and expenses of such sale of the said Bank Annuities, and of the payment of the proceeds of such sale and dividend out of court, and of the said application, and consequent thereon.

The Company opposed the latter part of the prayer of the petition, objecting that they were not liable to pay the costs, charges, and expenses of the sale of the Bank Annuities, and of the petition.

Mr. *Green*, in support of the petition.—The provision made by the original act (a) of the Great Western Railway

(a) Sect. 41 of 5 & 6 Will. 4, c. cvii, enacts, "that where, by reason of any disability or incapacity of any party entitled to any lands to be taken or used, or in respect of which any satisfaction, recompense, or compensation shall be payable under the authority of this act, the purchase-money for the same, or

the money paid for such compensation, shall be required to be paid into the Bank of England, to be applied in the purchase of other lands, to be settled to the like uses, in pursuance of this act, it shall be lawful for the said Court to order the reasonable expenses of all such purchases, and of the re-

Company, for the payment by the Company of the costs, charges, and expenses of the reinvestment of money in court only in cases of purchase of other lands, to be settled to the like uses, was found so insufficient for meeting the justice of many cases, that by a late act (a) the only con-

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investment of the purchase-money in land, together with the necessary costs, charges, and expenses of obtaining the proper orders for such purposes, to be paid by the said Company out of the monies to be received by virtue of this act; and the said Company shall from time to time pay such sums of money for such purposes as the said Court shall direct."

(a) 6 Will. 4, c. xxxviii, s. 8, enacts, "that where any money agreed or awarded to be paid for the purchase of any lands taken or used under the powers of this act, or for any compensation, &c., shall have been paid into the Bank of England, &c., it shall be lawful for the said Court of Exchequer, upon petition for that purpose by the party who would have been entitled to or in the receipt of the rents and profits of the lands in respect of which such money shall have been so paid from time to time, to order such part of the said purchase-money as the said Court shall think fit, to be laid out and applied in the repairing or rebuilding of any houses or other buildings taken down or injured in the construction of the said railway and works, in such manner as to the said Court shall seem fit."

Sect. 9. "That where, by reason of the disability or incapacity of any person or corporation entitled

to any lands, tenements, or hereditaments to be taken under or by virtue of this or the said recited act, or from any other cause whatever, the purchase-money for such lands, tenements, or hereditaments, or any money to be paid for or by way of compensation or satisfaction for any injury or damage done to the same, shall be required to be paid into the Bank of England, and be subject to the orders and directions of the Court of Exchequer, under the provisions contained in this and in the said recited act, it shall be lawful for the said Court to order all the said reasonable costs, charges, and expenses attending such purchase, taking, or using of any lands, tenements, or hereditaments, or which may be incurred in consequence thereof, and also of the investment of the purchase or compensation money paid in respect of such lands, tenements, and hereditaments, in real or government securities, and likewise of the reinvestment of such purchase or compensation money, or the government and real securities purchased therewith, in the purchase of lands, tenements, and hereditaments, as hereinbefore mentioned, together with the costs, charges, and expenses of obtaining the proper orders, and of all other proceedings for such purposes, and of the pay-

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dition attached to the power of the Court to direct that the Company shall pay all reasonable costs, charges, and expenses attending such purchase, taking, or using of any lands, tenements, or hereditaments, or which may be incurred in consequence, is, that the person in whose favour the Court makes such order should be under disability or incapacity. The 9th section refers to the preceding section, and clearly contemplates the payment of money out of Court for the purpose of building.

Mr. *Osborne*, contra, for the Company. — I contend that the 9th section of the 6 Will. 4, refers back to the 36th section of the first act, and to the “costs, charges, and expenses” applicable to the payment out of Court for the purposes therein mentioned, viz. the purchase of other lands, which shall be conveyed, limited, and settled, to, for, and upon such and the like uses, trusts, intents, and purposes, and in the same manner as the lands which shall be so purchased, taken, or used,” as therein mentioned. His Honor V. C. *Knight Bruce*, in a petition (*Ex parte Marshall*) (a), in which a tenant in tail who executed a disentailing deed, and afterwards applied for payment out of Court of monies invested under a railway act, and the “costs, charges, and expenses,” had so much doubt whether the payment out of Court was for the purposes of the act, as to decline to make an order against the Company as to the costs, charges, and expenses. The words of the 9th section of the last act, “all the reasonable costs, charges, and expenses attending such purchase, taking, or using of any lands, tenements, or he-

ment of the dividends and interest of the said government or real securities, and of the payment of the principal of the said purchase or compensation money, and of the government and real securities purchased therewith, out of Court,

to be paid by the said Company, and the said Company shall from time to time pay such sums of money for the said costs, charges, and expenses as the said Court shall direct.”

(a) See p. 56, post.

reditaments, or which may be incurred in consequence thereof," are clearly applicable to the costs of investigating the title; down to that part of the section it speaks only of costs incurred prior to the money being paid into Court, it then provides for the payment of the costs of investment, and of the payment of the money out of court, if for the purposes therein specified, viz. the purchase of other lands to be settled to the same uses. Although the 85th section of the act authorizes the investment of the monies in the manner stated in this petition, it does not throw the onus of costs on the Railway Company.

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Mr. *Green*, in reply.—The case of a tenant in tail does not come within the terms of the act, and is not at all applicable to this case, for as soon as the tenant in tail executes a disentailing deed, he ceases to be an incapacitated person, and the lands could not be settled to the same uses. In this case the vicarage house is subject to the same uses as that lately taken by the Railway Company.

The VICE-CHANCELLOR (after mentioning in the course of this argument that he did not think the case cited applicable to that before him) said:—I have nothing to do with the abstract justice of the case. The Legislature has thought proper to pass these acts, and when I am called on to construe an act of Parliament, I can only look at the words of the acts. Now, what does the 9th section say? It shall be legal for the said Court to order "all the reasonable costs, charges, and expenses attending such purchase," which means the purchase by the Company, or which may be incurred in consequence thereof; that is, the costs of the purchase, or the taking or using by the Company. There the matter stops as to the taking and using by the Company; then it provides for the investment of the purchase-money, the purchase of lands, and

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the reinvestment of the compensation money. This is not a case of the reinvestment of any portion of the compensation money in the purchase of "lands, tenements, and hereditaments, together with the costs, charges, and expenses of obtaining the proper orders, and of all other proceedings for such purposes," that is, in the reinvestment by the purchase of lands, &c., and "of the payment of the dividends and interests of the said government or real securities, and of the payment of the principal of the said purchase or compensation money, and of the government or real securities purchased therewith out of Court." In this case the application is not to have the purchase-money paid out of Court *simpliciter*, but to have it paid out of Court to defray the expenses, not of the purchase of lands, but of building a vicarage house. I am of opinion, that upon the true construction of these words the case for which the vicar contends has not been provided for by the act, and I have no judicial power to order the Company to pay the costs.

Mr. *Osborne* then asked for the Company's costs of this application, but the Court refused to give them, and made the order as prayed, each party to pay his own costs.

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Ex parte W. TETLEY and Another, re THE GREAT NORTH
OF ENGLAND RAILWAY.

Feb. 14.

THIS was the petition of the devisees in trust under the will of J. S. R., deceased, and after stating an order of the Court for a reference to inquire whether certain closes of land, in the petition mentioned, were a proper investment for a sum of £881 Reduced Annuities then in Court, which had been paid by the Great North of England Railway Company as compensation for land taken by them under the powers of their act, and that the Master had, amongst other things, found that the said closes were of the value of £1300, and that the petitioners were possessed of certain other monies as such trustees as aforesaid, for the purpose of being laid out and invested in the purchase of lands and tenements, and would apply so much of such other monies as would be sufficient to make up the said purchase-money of £1300; and had also found that the purchase was a proper one wherein to invest the money to arise from the sale of the said £881 Reduced Annuities. The petitioners prayed the confirmation of the Master's report, &c.; and also for a reference to tax the costs, charges, and expenses of the petitioners relating to the order of reference, and of the proceedings thereunder, and of investigating, evidencing, and approving the title to and of the conveyance and assignment of the said closes, and also of the said application, and of the order to be thereupon made, and of the proceedings consequent thereon, and that the same might be directed to be paid by the said Great North of England Railway Company to the petitioners.

The devisees in trust under the will of J. S. R. presented a petition to the Court, praying that a sum of money paid in by a Railway Company, together with another sum held by them for a like purpose, might be invested in the purchase of certain closes of land of the value of the amount of the two sums, and also praying the taxation and payment by the Company to the petitioners of the costs, charges, and expenses attending the purchase:—
Held, that, under the act of Parliament, the petitioners were not entitled to any such costs, charges, or expenses, nor to the costs of the application.

Mr. *Bates* appeared in support of the petition.

Mr. *Smythe* objected, that, as the purchase exceeded

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the amount in Court by about £500, the Company not liable to pay any of the costs.

Mr. *Bates*, in reply, cited *Ex parte Lord Palmerston* and contended, that, if he was not entitled to the costs, he was, at all events, entitled to an order similar that in *Ex parte Newton* (b).

The VICE-CHANCELLOR, (after reading the 9th section of the act) (c).—In this case it is not asked that the chase-money in Court, *simpliciter*, should be invested the costs and charges paid to the petitioner; but that sum *a*, together with a sum *b*, should be invested, and the Company directed to pay the costs of the investment.

(a) See note at the end of this case.

(b) 4 Y. & C. 518.

(c) 6 & 7 Will. 4, c. cv. The 9th section is as follows:—"That where, by reason of any disability or incapacity of any person or corporation entitled to any lands or hereditaments to be purchased, taken, or used under the authority of this act, or from any other cause, the purchase-money for any lands or hereditaments, or any money to be paid by way of recompense or compensation for any damage or injury done to the same, shall be required to be paid into the Bank of England, it shall be lawful for the Court of Exchequer to order the reasonable costs, charges, and expenses attending any such purchase, taking, or using of land, or which may be incurred in consequence thereof, and also all the costs, charges, and expenses of the investment of such

purchase or compensation in government or real securities and the investment of the same, and the government and real securities purchased therewith, the purchase of other lands and hereditaments together with the necessary costs, charges, and expenses of obtaining the proper orders of all other proceedings for the purposes, and for the payment of the interest and dividends on government or real securities in which such purchase or compensation money may be invested for the payment out of the principal of such purchase or compensation money, or on government or real securities aforesaid, to be paid by the Company, and the said Court shall from time to time pay sums of money for the charges, and expenses therefore mentioned, as the said Court shall direct."

a + b. I have no authority under the act to apportion the costs, and the thing is so contrived that it does not fall within the terms of the Act. I sit here, not to make authority, but to execute the authority given by the act. I cannot, therefore, make the order as to the costs, charges, and expenses.

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Mr. *Smythe* then applied for the costs of the Company in this application, which were ordered to be paid by the petitioner (*a*).

(*a*) Re NORTH MIDLAND RAILWAY COMPANY, Ex parte LORD PALMERSTON.

THIS petition was presented by Lord Palmerston, the tenant for life of land taken by the North Midland Railway Company, and it prayed the investment of certain monies which had been paid into Court under the railway act, in the purchase of other lands, to be settled to the like uses, and also the costs, charges, and expenses of the petitioner. An objection was taken as to the whole costs being borne by the Company, on the ground that the land which was to be the object of the investment was of much greater value than the sum in Court, it having been lately purchased by the petitioner at a much larger sum, and that it was only by arrangement with his trustees that the petitioner accepted the sum in Court as the purchase-money for the same, in order to bring the lands into settlement.

The VICE-CHANCELLOR OF ENGLAND made the order as prayed.

The order bears date the 16th June, 1842, [*Ex relatione* Mr. *Bates*, who appeared for the petitioner.]

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BEFORE V. C. KNIGHT BRUCE and THE LORD CHANCELLOR.

Jan. 30.
March 14.

Ex parte MARSHALL re THE GREAT WESTERN RAILWAY
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A tenant in tail, on attaining his majority, barred the entail in certain monies, the produce of land sold by his guardian to the Great Western Railway during his minority, and presented a petition to the Court for the payment to him of the purchase-monies, and of the costs, charges, and expenses incident to the application. The order was made as prayed.

THIS petition, presented by J. H. Marshall, stated that the guardian of the petitioner (then an infant) had, under the powers of the Great Western Railway Act, sold certain pieces of land, of which the petitioner was tenant in tail, to the Great Western Railway Company. That the purchase-money was paid into the Bank of England, and, by an order of the Court, invested. That the petitioner had attained twenty-one, and that, by an indenture of release of the 2nd November, 1844, he had (among other things) barred the entail of the monies then in Court standing in his name *ex parte* the Great Western Railway Company, and all dividends thereon. And the petition prayed for payment of the said monies to the petitioner, and for taxation of the petitioner's costs, charges, and expenses of, and incident to the said application, and order consequent thereon, and that the Great Western Railway Company, might be ordered to pay such costs, charges, and expenses.

Mr. Neate, in support of the petition.

Mr. Osborne, on behalf of the Railway Company, opposed that part of the prayer which required the Railway Company to pay the costs, charges, and expenses, and he contended that the 9th section of the Great Western Railway Act (*a*) was not applicable to the present case, and

(*a*) 6 Will. 4, c. xxxviii, sect. 9, enacts, "that where, by reason of the disability or incapacity of any person or corporation entitled to any lands, tenements, or hereditaments to be taken under or by virtue of

that the jurisdiction of the Court to grant costs did not extend beyond the strict words of the act. That the words of the act were strictly confined to the purposes therein mentioned, (viz.) the purchase of lands, tenements, and hereditaments, and that the petitioner, having elected to take the money as money, and not to reinvest it in the purchase of lands, the company were not bound to pay the petitioner's costs.

Mr. Neate thought it right to mention that the Vice-Chancellor of England had refused the costs on a similar application.

V. C. KNIGHT BRUCE.—My impression at present is, that the Court has the power, under its general jurisdiction, to deal with such costs; but I consider that such jurisdiction would be limited to proceedings before the

this or the said recited act, or from any other cause whatever, the purchase-money for such lands, tenements, or hereditaments, or any money to be paid for or by way of compensation or satisfaction for any injury or damage done to the same, shall be required to be paid into the Bank of England, and be subject to the orders and directions of the Court of Exchequer, under the provisions contained in this and the said recited act, it shall be lawful for the said Court to order all the reasonable costs, charges, and expenses attending such purchase, taking, or using of any lands, tenements, or hereditaments, or which may be incurred in consequence thereof, and also of the investment of the purchase or compensation money paid in respect of such lands, tenements, and hereditaments, in real or government secu-

rities, and likewise of the reinvestment of such purchase or compensation money, or the government and real securities purchased therewith, in the purchase of lands, tenements, and hereditaments, as hereinbefore mentioned, together with the costs, charges, and expenses of obtaining the proper orders, and of all other proceedings for such purposes, and of the payment of the dividends and interest of the said government or real securities, and of the payment of the principal of the said purchase or compensation money, and of the government and real securities purchased therewith, out of Court, to be paid by the said Company, and the said Company shall from time to time pay such sums of money for the said costs, charges, and expenses, as the said Court shall direct."

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Court, and would not extend to the costs of investigating the title, the perusal of abstracts, &c. As to the 9th section of the act, I do not think the confined construction is authorised, for, if it were, it would manifestly be contrary to the spirit of the act, and contrary, too, to material justice. Had this money been invested in land, the company would have paid the costs as a matter of course. It has so happened that a party, whose land has been taken compulsorily by the Railway Company, has chosen to take the purchase-money as money, and saved the Company thereby much expense. It is now contended that he must, on this account, bear the costs. I do not, however, like to make any decision in opposition to the judgment of the Vice-Chancellor of England, and I think the parties had better take the opinion of the Lord Chancellor on this point.

The LORD CHANCELLOR, (after reading the 9th section of the 6 Will. 4, c. xxxviii (a), and the 36th section of the 5 & 6 Will. 4, c. cvii (b)).—It appears to me,

(a) See preceding note.

(b) The 5 & 6 Will. 4, c. cvii, sect. 36, enacts, “that if any money shall be agreed or awarded to be paid for the purchase of any lands to be taken or used by virtue of the powers of this act, or of any interest therein, or for the release of any such lands from any rent or other incumbrance charged thereon, or for the enfranchisement of any such lands, being of copyhold or customary tenure, or for any compensation under this act which any corporation, tenant in tail or for life, husband, guardian, trustee, or feoffee in trust, commissioner, executor, or administrator, feme covert, or any person whomsoever,

or on behalf of any wife, ward, lunatic, idiot, or *cestui que trust*, whether infants, issue unborn, *femes covert*, or any person whomsoever, whose lands are limited in strict or other settlement, or any person under any other disability or incapacity, shall be entitled unto, interested in, or hereby capacitated to convey such money, shall, in case the same shall amount to or exceed the sum of £200, with all convenient speed be paid into the Bank of England in the name &c., and shall, when so paid in, there remain until the same shall, by order of the said Court made in a summary way, upon petition to be presented to the said Court by the

that the words "together with the costs," entitle the petitioner to have the costs of the payment of the money out of Court, and that the Company is liable to pay such costs. The words of the act are entirely general; it does not say "for the purposes aforesaid," but for the purposes of the act generally. When the act directs the payment of the money *into* Court, it clearly contemplates the payment of it *out* of Court, and this construction is consistent with the meaning of the act, and the justice of the case. When a public Company takes land for their own purposes, it is right they should pay all the costs incident on such taking. I think that this is an ungracious opposition on the part of the Company.

Ordered as prayed.

party who would have been entitled to the rents and profits of the said lands, be applied either in the purchase or redemption of the land tax, or in or towards the discharge of any debt or other incumbrance affecting the said lands, or affecting other lands standing settled therewith to the same or the like uses, trusts, intents, or purposes, as the said Court of Exchequer shall authorize to be purchased or paid, or such part thereof as shall be necessary, or until the same shall, upon the like application, be laid out, by order of the said Court made in a summary way as aforesaid, in the purchase of other lands,

which shall be conveyed, limited, and settled to, for, and upon such and the like uses, trusts, intents, and purposes, and in the same manner as the lands which shall be so purchased, taken, or used as aforesaid, or in respect of which such compensation or satisfaction shall be paid, stood settled, or limited, or such of them as, at the time of making such conveyance and settlement, shall be existing, undetermined, or capable of taking effect, and in the meantime, and until such purchase can be made, the said money may, by order of the said Court, upon application thereto, be invested," &c.

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BEFORE V. C. OF ENGLAND.

April 21 & 22.

PEARSON v. THE LONDON AND CROYDON RAILWAY COMPANY.

Under an act of Parliament a Company was empowered to raise £70,000, by the creation of new shares; and, at a meeting of proprietors, on the 25th of July, it was, by the second resolution, declared, "that every proprietor now registered, and also every holder of any scrip receipts, who shall have delivered up the same on or before the 10th of August next, to be duly registered, shall

have the option of subscribing for one of such new shares for and in respect of every five shares which every such proprietor may now, or which every such scrip-holder may on the said 10th August, have registered in their names." The 4th resolution provided, "that the shares which shall not be subscribed for under the option allowed by the 2nd condition, shall be allotted by the directors to those persons who may, on or before the said 10th August, apply for any such shares, *pro rata*, according to the number of shares so applied for by each proprietor, unless the whole number of shares so applied for shall exceed the number not subscribed for under the 2nd condition, in which case they shall be allotted to the applicants in proportion to the shares respectively held by them." A registered proprietor of 400 shares, being resident in Naples, did not receive and could not have received notice, in time to make his application before the 10th of August, but did so make it at the earliest moment. The shares having been all appropriated before A.'s application, he filed his bill against the directors for his new shares:—*Held*, upon the construction of the 2nd and 4th resolutions, that A. should have made his election before the 10th August, and that the resolutions did not make any difference between the registered proprietors and the holders of scrip as to the time of election. Demurrer for want of equity allowed with costs.

BILL filed on the 7th of March, 1845, stated, the act of Parliament incorporating the Railway Company, (5 Will. 4, c. x), and, that, by an act, (3 & 4 Vict. c. cxxix), power was given to the Railway Company to raise a sum of £60,000 in addition to what they had already raised under their former acts, for certain purposes therein mentioned; and that by a subsequent act (6 & 7 Vict. c. lxii), they were empowered to raise a further sum of £10,000 by creating new shares for carrying into effect the purposes of that act. That no part of either sums having been raised, a special general meeting was, on the 25th of July, 1843, duly (a) convened in the manner required by the first act, for the purpose of raising a sum not exceeding £70,000, and at such meeting the following resolutions were passed:—"That the directors be, and they are hereby authorized, to raise a fur-

(a) By the 82nd section of 5 general meetings, ten days' public Will. 4, c. x, it is enacted, that of notice, at the least, should be given all general meetings and special in the manner therein directed.

ther sum of money not exceeding £70,000 by a creation of new shares at £20 each, at the price of £10 per share, payable in the several sums, and at the several times following; (that is to say), 2*l.* 10*s.* per share on or before the 25th of August, 1843; 2*l.* 10*s.* per share, on or before the 25th of October, 1843; 2*l.* 10*s.* per share on or before the 25th of January, 1844; 2*l.* 10*s.* per share on or before the 25th of April, 1844, and upon the terms and conditions following, viz.—1st, That in case any payment be not duly made at the time appointed, the sum or sums which may have been previously paid shall be absolutely forfeited to, and for the use and benefit of the Company, at the discretion of the directors, ten days' notice being given thereof, signed by the secretary of the Company, and inserted in any three London papers, and in the Railway Times and Magazine. 2ndly, That every proprietor now registered in the Company's books, and also every holder of any scrip receipts who shall have delivered up the same on or before the 10th of August next, to be duly registered, shall have the option of subscribing for one of such new shares for and in respect of every eight shares which every such proprietor may now (or which every such scrip-holder may on the said 10th of August) have registered in their respective names. 3rdly, That every proprietor of shares may nominate, by letter addressed to the secretary, any other person to subscribe in his stead. 4thly, That the shares which shall not be subscribed for under the option allowed by the second condition, shall be allotted by the directors to those proprietors who may, on or before the said 10th of August, apply for any such shares, *pro rata*, according to the number of shares so applied for by each proprietor, unless the whole number of shares so applied for shall exceed the number not subscribed for under the second condition, in which case they shall be allotted to the applicants in proportion to the shares re-

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spectively held by them. 5thly, That neither the subscriber nor holder of scrip shall, as such subscriber or holder, be a proprietor of the London and Croydon Railway, or be entitled to any of the rights, privileges, profits, or advantages which belong or appertain to the proprietors of shares in the said railway, until the full sum of £10 shall have been paid on each share, and the scrip receipt be delivered up to the Company, and registered as a share in the Company's books. 6thly, That payments in full, with allowance of interest at the rate of £4 per cent. per annum, calculated upon each remaining instalment respectively, may be made at any time on or after the 4th of September next, but such payments shall not entitle the subscriber to any profits or advantages which belong or appertain to the proprietors of shares in the said railway, prior to the date of the last payment on the said subscription."

That the plaintiff was a registered proprietor of 400 shares, and had, therefore, the power of electing whether he would or would not subscribe for eighty of the new shares. The first intimation the plaintiff had of these resolutions was on the 12th of August, when he received a copy of the Railway Times at Naples, where he was then residing. That immediately on receiving such copy the plaintiff wrote to the secretary of the Company in the following terms:—

" Sir,

" Naples, 12th August, 1843.

" I have just seen by the newspaper of July the 29th, which arrived to-day, that a certain number of new shares in the London and Croydon Railway are to be raised and apportioned among those of the present proprietors who may be desirous of taking them. I beg to state, that I wish to take the number which will fall to my share as a holder of 400. I shall be obliged to you to deliver them

to my bankers, Messrs. Drummond, Charing Cross, whom I will instruct by this day's post to pay the calls as they may become due.

"Your obedient servant,
"EDWIN PEARSON."

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In reply to such letter, the secretary of the Company, on the 2nd of September, wrote as follows:—"I beg to inform you that in the latter end of July last a circular was addressed to you at Gloucester Terrace, Regent's Park, for the purpose of ascertaining whether you would subscribe for new shares or not, and as you, with many other proprietors, returned no answer thereto before the day fixed for the apportionment, viz. the 10th of August, it was presumed that you did not wish for any of the new shares, and they were consequently apportioned in due course to those proprietors who had applied for them. I extremely regret that your absence from England should have precluded you from the advantage of subscribing for the new shares, but the time allowed for doing so was fixed by the shareholders, and the directors had no power to extend it." After stating several applications made by the solicitor of the plaintiff for an allotment of the new shares to the plaintiff, to which applications the Company replied, that they had not the means of complying, the bill prayed, that the plaintiff might be declared to be entitled to subscribe for one new share for and in respect of every eight shares of which he was a registered proprietor in the books of the said Company on the 28th of July, 1843, and that the defendants might be decreed to transfer to him such new shares as he should be entitled to subscribe for after the proportion aforesaid, together with any dividends which had accrued or which should accrue and become payable upon the same, upon payment by the plaintiff of what was due upon the instalments payable upon the same respectively, plaintiff thereby offering to pay the

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same accordingly; or, if the said new shares for which plaintiff was entitled to subscribe had been appropriated to other proprietors in the said Company, then that the said Company or the said directors might be declared to have been trustees for plaintiff of so many new shares as plaintiff was entitled to subscribe for, and might be decreed to procure and transfer to plaintiff so many new shares as plaintiff was entitled to subscribe for in the proportion aforesaid in the place of those so appropriated by them to other proprietors in the said Company, together with any dividends which had accrued or which should accrue and become payable upon the same, upon payment by plaintiff of what was due upon the instalments payable upon the same respectively, plaintiff thereby offering to pay the same accordingly.

The Railway Company put in a general demurrer for want of equity to this bill. It was admitted on both sides (although no statement to this effect was inserted in the bill, that all the new shares had been allotted to other shareholders.

Mr. Stuart and Mr. Maule, in support of the demurrer — There is no distinction made by the resolutions between the registered shareholders and the holders of scrip: provided the latter register their shares within a given time they are put on an equal footing with the former. The object of the Company was to raise a certain sum of money within a certain time, and if the 10th of August was not the time fixed for the allotment of shares, how was it possible to define the limits within which the sum required would be paid into the hands of the Company? If the Company were to await the decision of parties living in remote places, the object of the resolution would be defeated by the uncertainty whether the registered shareholders would or would not take the shares to which they were entitled on certain conditions. The benefi

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offered by the Company was not to all shareholders, for those who did not hold more than five shares were excluded, and so were all those who did not comply with the conditions contained in the resolution. This is not a case of forfeiture of any right, but the non-compliance with a condition precedent by which a right might have been established. This cannot be considered a case of hardship on the plaintiff, as he had absented himself from the place where his business was situate, without having appointed any one to act for him in his absence : *Sparks v. The Liverpool Water Works Company (a)*, *Pendergast v. Turton (b)*.

Mr. *Parker* and Mr. *John Pearson*, in support of the bill.—The resolutions point out no particular time within which the registered proprietors are to make their election, and those resolutions only refer to the holders of scrip, who are thereby entitled to certain benefits on certain conditions. The registered shareholders give up a certain benefit by allowing their old shares to be depreciated by the introduction of new ones, and they enter into a contract, that, if they allow such depreciation, they are to be entitled to certain new shares as an equivalent. The directors are trustees of the new shares for the registered proprietors, and the appropriation of such shares to other persons before the registered proprietor had declared his intention not to take them, was a breach of trust, for which the directors were liable. There was no possibility for the plaintiff to make his claim within the alleged time, for although he had done so at the earliest moment, yet such claim did not reach the secretary of the Company before the shares had been allotted. The resolutions had been passed by the shareholders, and not by the directors ; and as the resolution contained no specified time wherein the registered proprietors were to make their election, the di-

(a) 13 Ves. 428.

(b) 8 Jur. 205.

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rectors had no power to fix the 10th of August, or any other day, for that purpose. Time was not of the essence of the contract; the party was not to lose his right without notice. The cases cited differ from the present in this, that in the first the forfeiture was clear, in the other the judgment was given on the ground of delay.

The VICE-CHANCELLOR (without hearing the reply).— I think this is a plain case. It is true, the resolutions are not expressed so clearly as they might have been; but the question is, are they expressed with sufficient clearness? Now the second resolution is so framed, in terms, that the 10th of August is not annexed to the expression regarding the registered proprietors, but is made in terms to apply to the holders of scrip; and as to them it is provided, that, if they convert their scrip into registered shares on or before the 10th of August, they shall have a right to elect to subscribe for the new shares; that is, it puts the holders of scrip, who should comply with the condition, on a footing with the registered holders. It would be rather whimsical to put the construction on it that has been contended for, viz. that those who were registered proprietors might have any time to exercise their option, but that the scrip-holders who should become registered, should only have until the 10th of May to exercise their option. Whatever doubt is created by the former resolutions is, however, cleared up by the fourth, for that resolution provides, that those shares which should not be subscribed for under the option allowed by the second condition should be allotted to those proprietors who, on or before the 10th of August, should apply, &c. It is manifest, therefore, that, on the 10th of August, the rights of the parties became settled, that those who had applied for shares under the second condition should have them; and if any new shares remained unapplied for, those shareholders who had applied for their proportionate number of shares should have the re-

maining shares appropriated to them, *pro rata*: that is very plain. And when it is said, that the resolutions were for the benefit of all, that is not so; for if there were any number of shareholders, each having less than five of the old shares, not one of them could derive any benefit from the new shares; therefore, it was a restricted benefit for those persons, who, at that time, or on or before the 10th of August, should be the registered proprietors of at least five of the old shares. I am of opinion, that there is no equity on this bill, and I must allow the demurrer, with costs.

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BEFORE V. C. WIGRAM.

LANGFORD v. THE BRIGHTON, LEWES, AND HASTINGS
RAILWAY COMPANY.

Nov. 25.

THIS was a motion for a special injunction, upon notice, to restrain the defendants from commencing or carrying on, upon the plaintiff's land, called Mount Field, in the parish of Southover, in Sussex, any works whatsoever; and from excavating, digging up, or carrying away any earth or soil of, from, or upon the plaintiff's land; and from entering, traversing, or committing in, over, or upon the same land, any trespass, injury, spoil, or destruction whatsoever, and from in any manner interfering therewith, until the defendants should have fully and finally carried into effect and completed the terms and provisions of an

Before the amount to be paid by a Railway Company, for land required by them for the purposes of their railway, had been determined, a verbal consent, by one party stated to be qualified, by the other alleged to be general, was given, whereupon the Rail-

way Company entered upon the land, and commenced works which would permanently affect it:—*Held*, that the Court will not interfere by injunction to stop the works, if perfect justice can be done, by compelling the Company to pay for the land; but will order the proximate value to be deposited until the amount be determined.

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agreement, bearing date the 16th of May, 1844, distinguished in an act of Parliament, 7 & 8 Vict. c. xci (a) relating to the said land, and until the compensation there provided for should have been assessed and paid to the plaintiff, or until the defendants should have appeared and have fully answered the plaintiff's bill.

The clause in the agreement as to the payment of compensation was as follows:—"The compensation paid to Mr. Langford to be settled by referees, one appointed by each party; with power for the referees to appoint an umpire."

The affidavits filed on behalf of the plaintiff stated he was owner in fee simple of Mount Field, which was a part of the grounds formerly belonging to the priory of St. Pancras; and that it was pleasure ground, and

(a) The material sections of this act were the following:—

Section 145 enacts, "that the Company shall not, except by consent of the owner and occupier, enter upon any lands which shall be required to be purchased or permanently used for the purposes of this act, until they shall either have paid to any party having any interest in such lands, or deposited in the Bank of England in the manner herein mentioned, the purchase-money or compensation agreed or awarded to be paid to such parties respectively for their respective interest: provided always, that, for the purpose merely of surveying, setting out the line, and taking levels of such lands, it shall be lawful for the company to enter upon the same without the previous consent of the owners, making compensation for any damage thereby occasioned to the

owners and occupiers of lands."

Section 246 enacts, "that the Company, in making the said intended railway through a certain field called 'Mount Field,' in the parish of St. John the Baptist, Southover, in the said county of Sussex, belonging to John Langford, the Company and they are hereby required to make and construct the said railway according to the agreement made between the parties, and signed by H. Faithfull, the authorized agent of the said Company, and Warrant Cooper, the authorized agent of the said John Langford, the line so agreed upon being there laid down in the deposit deed, and in no other way or place; and the said Company and they are hereby required, at all times hereafter to perform the stipulations and conditions contained in the same agreement."

the Mount Field by reason of an old ornamental mound of earth raised in the field, part of the ancient relics belonging to the said priory.

That, after the passing of the Railway Act, and in September then last, but before any steps had been taken by the Company to comply with the terms of the agreement, and the act confirming the same, the Company, by J. S., their agent, applied for leave to begin to set out upon the said field the line of their intended railway, assuring plaintiff that he and his interest should not suffer any detriment by his giving such leave.

That, on this assurance, the plaintiff did, for the purpose of such beginning the said railway, by setting out the line only, give a verbal leave to the agent of the railway Company, and to A. R. B., their solicitor, to enter upon the land.

That, on the 8rd of November, before any steps had been taken by the Company to comply with the terms of the said agreements, and without any other leave or license than the verbal one before mentioned, the Company, by their workmen, again entered upon the said piece of land, and commenced digging up and excavating the same, and performed other works thereon, for the purpose of constructing their railway, and permanently using the land, contrary to the intention of plaintiff.

That plaintiff, on the 5th of November, served a notice on the defendants not to trespass or do any further damage until they had complied with the provisions of the act; and by the same notice withdrew any consent he might have given, unless the defendants previously agreed on and paid compensation for the land.

That, after the receipt of the notice, the Company for a time desisted, and quitted possession of the land; but, on the 13th of November, recommenced their works, and continued them until the 17th.

That the Company, instead of complying with the terms

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of the agreement, in the month of January, 1845, served a notice on the plaintiff, demanding his land under the compulsory powers of their act, and threatening to summon a jury to assess the amount to be paid to him for the same, notwithstanding the agreement, and that no purchase-money had been paid or offered.

The affidavit of the solicitor of the railway Company (the facts in which were confirmed by four other affidavits) stated, that he had caused a plan of the land required by the defendants for the purpose of the construction of a part of their railway to be delivered to the plaintiff, and at the same time had caused a printed notice to treat and agree, in the usual form, to be given to him, with a view to shew him that defendants wished to come to a settlement with him, and were desirous of prosecuting their works on the land immediately; and that afterwards, and before the 27th of August, the deponent was informed that the plaintiff had given his permission and authority for defendants to enter upon and take possession of the land so required, previous to the settlement of compensation. That, on or immediately after the 27th of August, the deponent obtained an interview with the plaintiff, and inquired of plaintiff if he had given such permission and authority as aforesaid, whereupon plaintiff informed him, that he had given such permission and authority, and that the plaintiff had no objection whatever to the defendants taking such possession and prosecuting their works upon his land, and that the plaintiff thought it would be better for him that the works should be proceeded with, as he thought it would look worse when the valuer came to see the land cut about, than it would if they saw it before. That, in consequence of such authority and permission so given by plaintiff, the engineers and contractor of the Company took possession of the land, and prosecuted the works thereupon, and fences were put up to inclose the portion required by the Company; and that

such possession was taken of the land so fenced off with the full knowledge and concurrence of the plaintiff; and that, in or about the last week in September, or the first week in October, the plaintiff stated to the deponent, that he was glad the Company had taken possession and begun their works upon his land; to which the deponent replied, that he thought it was very immaterial with reference to the question of compensation, whether the owner of land withheld or gave up possession of his land and permitted the works to be prosecuted or not; and that, as the plaintiff thought it was to his advantage to have the works executed before the question of compensation was settled, the plaintiff then had his own way, but that the Company wished the matter settled. That, subsequently to September, the deponent several times saw plaintiff upon the land when the workmen were employed in prosecuting the works, and plaintiff repeated his statement as to his reason for giving possession, and fully recognized such possession having been taken by the Company with the consent of the plaintiff. That the permission was not limited to setting out the line of railway, or the fencing of the land, or the commencing the works, but was given without any condition, reservation, or limitation. That, on the 4th of November, John Smith, land valuer, waited upon the plaintiff, and urged him to a settlement, and to request him to name his referee if the terms could not be agreed on. On the 4th of November, the plaintiff stated to the deponent that they could not agree, and that plaintiff should stop the works of the Company upon his land. That the name of the referee of the plaintiff was not communicated to the defendants, nor to any person on their behalf, until the 16th of November, and on the 17th of November an agreement in writing for a reference was entered into between the defendant and the Company.

The plaintiff's affidavit in reply was as follows:—"I did, in the month of August last past, have an interview

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and conversation with A. R. Briggs, and I did give my consent to him for the defendants to take possession of my field, called the Mount Field, for the purpose of fencing off from the said field the portion required by the Company for their intended railway. but not further or otherwise; and that, upon the application of J. Smith, I gave leave for the defendants to commence the setting out upon the said field the line of the intended railway, and removing the surface soil thereof, the said J. S. alleging and stating to me, that he was anxious to take a journey into Wales for the benefit of his health, and that such entrance into my land should not cause any detriment or injury to my interests; and I understood, from the said conversation with the said J. S., that, as the defendants were about making a settlement with one Mr. V. for some lands near to or adjoining my said field, and as soon as the said J. S. returned from Wales, he would talk over the compensation to be paid to me for the said land, and see if it could not be settled without a reference; and, so far from my consenting to the defendant entering upon my lands for any other than such limited purpose, or to their permanently occupying it, or completing the works of the said railway, my intention was only for them to make such commencement, and I believed that before taking permanent possession of the same, the said defendants would pay me the compensation for injury, and for the land; that, after the said land had been so fenced off, and after the removal of the surplus turf, but before any cutting of the land for the purpose of the excavations since made thereon, but whilst the excavations were proceeding on the adjoining land not belonging to me, I had a conversation with the said A. R. B. as to the possession of my said land so taken by the defendants, but never, to my knowledge or belief, did I say that it was to my advantage to have the works executed before the question of compensation was settled; my observation to the said A. R. B.

being to the effect, that the nearer the works were brought to my land, the depth of the cutting as it was then making on such adjoining land would be better seen. That in no conversation which I have had with the said A. R. B., did he request or urge me to name a valuer or referee, until the 4th day of November, when the said J. S. stated to me, that he was unable to make any offer for the price of the said land, and that I must appoint a referee; and that, in an interview with the said A. R. B. on the 8th of November, he urged me to appoint the said J. S., the valuer for the said defendants, as the joint referee of myself and defendants, to which I objected. That on no occasion did I give to either the said A. R. B., or to J. S., his clerk, or to the said J. S., land valuer, leave or license for the said defendants, any other than such verbal and limited leave to enter upon the said land for the purposes of the said railway; nor have I ever given any leave or license to them permanently to use the said land for excavations, cuttings, or other such works of the said railway, or for permanently using the said land, without first giving me the compensation to be agreed upon by the referees: and I never considered that any conversation that passed between me and either of them the said A. R. B., J. S., his clerk, or J. S., land valuer, could be construed to extend or be taken as leave or license for the defendants to take possession of my land, and to complete the works thereon, further than for the defendants to mark out the line of said intended railway, and to make such beginning; and that I always expected and believed, that, before the said defendants entered fully into the possession of my land, they would pay me the full price and compensation for the same, pursuant to their said agreement.

Mr. *J. H. Palmer*, for the plaintiff, contended, that the qualified permission granted to the Company did not en-

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BEFORE V. C. KNIGHT BRUCE.

Dec. 19 & 23. *Ex parte* WILKINSON and Others, re THE LONDON AND PORTSMOUTH DIRECT RAILWAY COMPANY.

A Railway Company (whose bill, at the close of a session of Parliament, was before a Committee of the House of Lords) sought, by petition, to get the deposit, lodged by them in the Bank of England, previously to such session, paid out to one of the five directors in whose names the deposit had been made:—*Held*, that this case

THIS was the petition of W. A. Wilkinson and four others of the projectors of the London and Portsmouth Direct Railway Company, which, after stating that they had deposited in the Bank, pursuant to the standing orders of the House of Commons, a sum of £55,710, and had taken the necessary steps to procure an act of Parliament to enable them to make and construct their said intended railway, and that the bill brought in by them for this purpose was, at the termination of the session, still before a committee of the House of Lords, prayed that the sum of £55,710, standing in the books of the Bank of England to the credit of the said projected undertaking, might be paid to the petitioner W. A. Wilkinson (*a*).

came within the alternative contained in the 4th section of the 1 & 2 Vict. c. cxvii; and the order was made for payment to the five directors, it not appearing that the one director named in the prayer of the petition had been legally appointed to receive it.

(*a*) This application was made under the 4th section of the 1 & 2 Vict. c. cxvii, which was as follows:—“That, on the determination of the session of Parliament in which the petition or bill for the purpose of making or sanctioning such work or undertaking shall have been introduced into Parliament, or if such petition or bill shall be rejected or finally with-

drawn by some proceeding in either house of Parliament, or shall not be allowed to proceed, or if an act be passed authorizing the making of such work or undertaking, and if, in any or either of the foregoing cases the person or persons named in such warrant or order, or the survivor or survivors of them, or the majority of such persons, apply by petition to the Court, in the name of

Mr. Briggs also. Mr. *Palmer* says it is a mere slip, and if an opportunity was given to the plaintiff he would negative it as to all. If he did, I do not know but that I should believe what the four witnesses swear; but nothing would be more dangerous to the administration of justice than to allow a party, after a case has been argued, to supply the very defect upon which the judgment of the Court is about to be pronounced. But I have not a suspicion that this is an accident; it is impossible that Mr. Langford, in going through these affidavits, should not see what these four witnesses said. I think, therefore, it is a case in which there was a valid license to go on with the works, without paying for it. This is quite foreign to the case cited from Meeson and Welsby. This decision will not prevent Mr. Langford from going to law, but it is not a case in which this Court will interfere. At the same time, it appears to me, perfect justice may be done in this way. This is an application that ought not to have been made, and Mr. Langford will pay the costs; but the money to be paid to Mr. Langford might be deposited.

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Motion dismissed, with costs.

Order for payment of £1000 into the Lewes Bank, to abide the award of the referees.

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BEFORE V. C. KNIGHT BRUCE.

Dec. 19 & 23. *Ex parte* WILKINSON and Others, re THE LONDON AND PORTSMOUTH DIRECT RAILWAY COMPANY.

A Railway Company (whose bill, at the close of a session of Parliament, was before a Committee of the House of Lords) sought, by petition, to get the deposit, lodged by them in the Bank of England, previously to such session, paid out to one of the five directors in whose names the deposit had been made:—*Held*, that this case

THIS was the petition of W. A. Wilkinson and four others of the projectors of the London and Portsmouth Direct Railway Company, which, after stating that they had deposited in the Bank, pursuant to the standing order of the House of Commons, a sum of £55,710, and had taken the necessary steps to procure an act of Parliament to enable them to make and construct their said intended railway, and that the bill brought in by them for this purpose was, at the termination of the session, still before committee of the House of Lords, prayed that the sum of £55,710, standing in the books of the Bank of England to the credit of the said projected undertaking, might be paid to the petitioner W. A. Wilkinson (*a*).

came within the alternative contained in the 4th section of the 1 & 2 Vict. c. cxvii; and the order was made for payment to the five directors, it not appearing that the one director named in the prayer of the petition had been legally appointed to receive it.

(*a*) This application was made under the 4th section of the 1 & 2 Vict. c. cxvii, which was as follows:—“That, on the determination of the session of Parliament in which the petition or bill for the purpose of making or sanctioning such work or undertaking shall have been introduced into Parliament, or if such petition or bill shall be rejected or finally with-

drawn by some proceeding in either house of Parliament, or shall not be allowed to proceed, or if an act be passed authorizing the making of such work or undertaking, and if, in any or either of the foregoing cases the person or persons named in such warrant or order, or the survivor or survivors of them, or the majority of such persons, apply by petition to the Court, in the name of

It was stated by Mr. *Osborne*, (who appeared for the petitioner), that this sum of money was that proportion of the subscriptions for the said undertaking which had been paid into Court in compliance with the standing orders of the House of Commons; that the bill, at the close of the session, was before the Committee; and that, it being apprehended on the part of the Company that, in consequence of the termination of the session, it would be necessary, in order to comply with the standing orders, to enter into a new subscription contract, and make a new deposit, this application was made for the purpose of getting the former deposits out of Court.

The *Vice-Chancellor* ordered the payment to be made to the five petitioners, being of opinion that the appointment

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whose Accountant-General the sum of money mentioned in such warrant or order shall have been paid, or to the Court of Exchequer in Scotland, in case such sum of money shall have been paid in the name of the said Queen's Remembrancer, the Court, in the name of whose Accountant-General or Queen's Remembrancer such sum of money shall have been paid, shall, by order, direct the sum of money paid in pursuance of such warrant or order, or the stocks, funds, or securities in or upon which the same are invested, and the interest or dividends thereof, to be transferred and paid to the parties or party so applying, or to any other person or persons whom they may appoint in that behalf; but no such order shall be made in the case of any such petition or bill being rejected, or not being allowed to proceed, or withdrawn, unless it be

proved by the certificate of the chairman of committees, if the said petition or bill was rejected, or not allowed to proceed, or withdrawn in its passage through the House of Lords, or of the said speaker, if the said petition or bill was rejected, or not allowed to proceed, or withdrawn during its passage through the House of Commons, that the petition or bill has been either so rejected, or not allowed to proceed, or so withdrawn by some proceeding in one or other house of Parliament, which certificate the said chairman or speaker shall grant on the application in writing of the person or persons, or the majority of the persons named in such warrant or order, or the survivor or survivors of them; and every such certificate shall be conclusive proof of such rejection, or not proceeding, or withdrawal.

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of W. A. Wilkinson was not such an appointment as was contemplated by the act, or such an one as the Court could recognize.

In drawing up the order, a difficulty was suggested by the registrar, on the ground that this application did not come within the 4th section of the 1 & 2 Vict. c. cxvii, there being a sessional order of the House of Commons, enabling the parties to take up their bill in the ensuing session at the stage in which it was at the termination of the previous session.

Mr. *Osborne* now applied that the order might be drawn up, on the grounds that the sessional order could not deprive the petitioners of the right which the act of Parliament gave them, to apply for and receive the deposit at the termination of the session.

The VICE-CHANCELLOR (after perusing the 4th section of 1 & 2 Vict. c. cxvii).—I am of opinion that the case comes within the first of the alternatives suggested by the act; and, no other act of Parliament appearing to restrict my power to order the money to be paid out, I shall, without considering the effect of the standing orders, confirm the order as already made.

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BEFORE V. C. WIGRAM.

DAWSON v. PAVER and Others.

THE plaintiff in this case was the owner of certain lands, extending over 1000 acres, in the township of Osgodby; and the defendants were the commissioners named in an act of Parliament (6th Vict. c. 6), intituled, "An Act for inclosing lands in the township of Cliffe cum Lund, in the parish of Hemingbrough, in the East Riding of the county of York." Under the 27th section of the act, they had power to make drains, and, after paying the expense of inclosure, and of the drainage, they had power to direct, by their award, by whom and in what proportion such expenses were to be paid. The plaintiff's lands (bounded by the lands included in the Inclosure Act, which were called by the several names of the Oxgangs, lying to the north; the Whitemoor, lying to the south of the Oxgangs; and Cliffe Common, south of Whitemoor) had been drained, from time immemorial, by two drains, one called the "main," or clay drain, running from Osgodby in an easterly direction, dividing Oxgang and Whitemoor from Cliffe Common, through a bridge, called Lara Bridge, to the river; the other, called the "Insewer" drain, emptying itself into the main drain about 330 yards east of the plaintiff's lands, and a little above Lara Bridge. The defendants, for the purpose of draining the Oxgangs and Whitemoor, marked out and commenced cutting a drain

Nov. 3, 4, & 5, & Dec. 5.

The owner of certain lands at O. had used from time immemorial a certain ancient watercourse, for the purpose of draining his lands; and, for the improvement of the drainage, had altered a bridge some distance below them. The commissioners appointed by an inclosure and drainage act cut some new drains into the ancient watercourse at a point below the plaintiff's land, but above the bridge, whereupon he filed a bill for an injunction, on the ground that the accession of water brought down by the new drains would obstruct his flow of water.

On the motion to dissolve an injunction

obtained *ex parte*, an issue was directed, and an *interim* injunction granted.

The verdict having been given in favour of the plaintiff, the defendant moved for a new trial, which was granted, on the ground that events had happened since the trial of the issue which would enable the jury to give a verdict founded on experience.

Held, that the rule that an individual may so use his own property as not to injure his neighbour's, applies to persons acting under inclosure and other acts of Parliament of a similar nature.

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at right angles to the main drain, and running into it a little below the point at which the Insewer drain united with it. The plaintiff thereupon (in November, 1844) filed his bill, charging, that, if the drain were made in the way proposed by the commissioners, the quantity of water brought down by the new drain would be so great that it would pen back the water in the main drain, and cause plaintiff's lands to be flooded; and the bill prayed, that the defendants might be restrained by injunction from cutting, opening, making, or completing any drains &c. which should empty themselves, or flow into the ancient drain or watercourse, and also from using or permitting water to flow into the drain cut by them, so as to surcharge or increase the water in the ancient drain, or so or in such manner as at any time or season to obstruct, force back, impede, or interfere with the free passage and flow of the water from the plaintiff's lands along such ancient drain.

On the 26th of November, an injunction was granted, *ex parte*, to restrain the defendants &c. from permitting water to flow into the ancient watercourse, in the bill mentioned, through the drain then lately cut by the defendants, into the same or any other drain, so as to obstruct the drainage of plaintiff's lands, by means of the said ancient watercourse, in such manner as the same had theretofore been used and enjoyed by the plaintiff. The defendants put in their answer to the original bill, and thereupon moved to dissolve the injunction.

The evidence on the part of the plaintiff was to the effect, that, when the water at Lara Bridge stood at three feet, the water in the main drain was at such a height as to preclude any water from flowing from the plaintiff's land and effectually prevent the drainage; that, in order to improve the flow of the water, the plaintiff, in July, 1843, deepened and widened Lara Bridge, since which time there had been no flooding of the plaintiff's land; that the effect of the new drains would be to raise the level of the water at Lara

Bridge, and consequently to prevent any drainage from the plaintiff's lands.

The evidence on the part of the defendants, given by scientific men, went to shew, from calculations made by them, that more than one inch of water had never been known to fall in twenty-four hours; and that that quantity falling on the Oxgangs and Whitemoor (150 acres in all) would never produce the effect contemplated by the plaintiff. That a much greater quantity than could possibly flow from the lands in question would not have any effect upon the plaintiff's drainage, which was 330 yards above the point of junction. The affidavits on the question of the injury likely to ensue to plaintiff by the admission of the water from the new drains into the ancient water-course being so conflicting, his Honor, by an order of the 15th of April, 1845, reciting, that the defendants, by their counsel, declined to make any alteration in the course of drainage proposed to be made by them before the filing of plaintiff's bill, or to widen or defray the expense of widening a certain bridge therein-mentioned, the plaintiff, by his counsel, offering to consent to the bridge being so widened, or to undertake thereafter to do any such acts, in case the same should obstruct the drainage of the plaintiff's lands by means of the ancient water-course, in such manner as the same had theretofore been used and enjoyed by plaintiff, ordered, that the parties should proceed to a trial at law, at &c., upon the following issue, viz. whether the drainage made, or effected, or intended, at the filing of the plaintiff's bill, to be made or effected by the defendants, into the ancient water-course, would, if completed, to the damage and injury of plaintiff, obstruct the drainage of the plaintiff's lands by means of the ancient water-course, in such manner as the same had theretofore been used by the plaintiff; and that the jury should have a view in case the Court, before which such issue should be tried, should think fit; and that the in-

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junction should continue until the hearing of the cause or further order.

On the 22nd July, the issue came on to be tried, and the jury, who had previously had a view of the drainage, delivered a verdict for the plaintiff.

This was a motion for a new trial.

Mr. *Kenyon Parker*, Mr. *Malins*, Mr. *M. A. Shee*, and Mr. *Hugh Hill*, for the defendants, in support of the motion.

Mr. *Anderdon*, Mr. *Romilly*, Mr. *Cowling*, and Mr. *Crawford*, contra.

Affidavits were filed, on both sides, agreeing that, in the month of August, heavy rain had fallen, but very widely differing in the statement of the effect produced on the ancient water-course by the admission of water through the new drains. The defendants contended that a new trial would, under the circumstances, afford to the Court an opportunity of testing the effect of the late rains, and thereby of rightly determining the question of fact.

The VICE-CHANCELLOR, (after stating the facts, and referring to the evidence).—I sent the case to an issue, to try whether the effect of the defendants' drainage be to injure the plaintiff's land, and I did so in consequence of the defendants having refused to make any alteration in the drainage if the result of experience should shew that the effect the plaintiff apprehends would be produced. When the case was tried, the evidence I have referred to was given, and the jury found a verdict for the plaintiff, but in their verdict they excluded Cliffe Common, which lies to the south of the main drain, from having any effect whatever in the case. Now, the opinion of the Judge ap-

pears to have been this : he thought (and his mind is very well informed on scientific subjects) that he should have found with the scientific men, but at the same time he said, as the jury were very intelligent and very attentive, and as they appeared thoroughly to understand the case, though he thought he should have given a verdict according to the evidence for the defendants, he was not dissatisfied with the verdict given by the jury.

The case then came on before me on a motion for a new trial. Now, the question I have to consider is one of much more difficulty in this case than occurs in ordinary cases, because the purpose for which I directed the issue was, that I might have a foundation on which to found my decree in this cause. The question, therefore, whether I am satisfied with the verdict, is, whether I am satisfied with it to the extent of being able to found on it a decree in the plaintiff's favour, and, if I am not satisfied with the verdict to that extent, I shall be under the necessity of making a decree against the plaintiff *non obstante veredicto*, (which has been done in some cases), or I must put this case in a train for further investigation ; therefore the question I have asked myself is, whether this verdict is sufficient to enable me to act upon it in the plaintiff's favour, either for the purpose of a perpetual injunction, or an interim injunction until the hearing of the cause. Now, with regard to these matters, it appears to me that I must consider the distinction as really not existing, because, if the verdict is not sufficient to enable me to make a decree on it at the hearing, one of two consequences must follow, (unless I am to make a decree for the defendants,) which are these : that, at the hearing of the cause, I must direct a new issue, or the plaintiff must go into evidence to shew how far subsequent experience shall have confirmed the verdict of the jury ; and, attending to the unsatisfactory way in which mere questions of fact do come before this Court by the mode of examination,

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viz. by depositions of witnesses taken on interrogatories, the Court can seldom act on them satisfactorily. It might not improbably happen, as it did happen in a case I have often referred to, the case of *Gompertz v. Ansdell* (a), where there had been a trial at law on an issue directed by this Court; before the hearing, parties went into evidence on the question, it being a question of fact, and when it came to the hearing, Lord *Cottenham* had to direct a second issue in the cause, and then the whole thing had to be done over again.

I am also to consider this : that, if the verdict is not quite satisfactory to my mind, I am called upon to do a very strong thing, viz. to restrain a party from exercising a clear legal right, not because an injury has been done, but on a speculative ground as to what will be the effect of things which have not hitherto been tried. Lord *Eldon's* decision in *Blakemore v. The Glamorganshire Canal Company* (b), (which has been acted on since) is quite sufficient to justify me in saying, that if there is ground to believe injury will result from certain acts, this Court will not permit those acts to be done, if it sees that the probable effect of them cannot afterwards be repaired ; and that observation applies to this case more strongly than another, because, in the case of an individual and owner of lands merely exercising his common legal right over his own property, the Court can compel him at any time to set the matter right ; but the defendants against whom the plaintiff is now proceeding are commissioners, acting under an act of Parliament, and when they have once made their award, which will include directions about this drainage, they will be in fact *functi officio*, and it will be difficult to say against whom the plaintiff can go, if it turn out that his estate has been destroyed by what has been done by these Drainage Com-

(a) 4 My. & Cr. 449.

(b) 1 My. & K. 154.

missioners. That being the fact, I shall make a single observation on the position in which the parties stand.

The plaintiff, as I have said, is the owner of this estate, the drainage of which, as far as experience goes, was perfect before the defendants began to exercise the power given to them by the act of Parliament. It has been argued that the Court has no right to control the power given to the commissioners by their act. My opinion as to that act is this: I consider that it has no other effect than to give these commissioners powers to be exercised for the benefit of the owners of the lands to whom the Organgs, and Whitemoor, and Cliffe Common belong, and it subjects the owners of those lands to be rated for the expense of inclosure and drainage, and the future expense of maintaining the drains; as between themselves the powers given by the act are large and most important.

I do not understand that by that act, or similar acts, the Commissioners have any further powers conferred on them to injure a person not included in the act, than the absolute owner of the land would have if the land were in his own hand, and he had by law the power to do the act. The rule, that a man may so use his own property as not to injure another, applies as much to persons in the situation of these commissioners as it does to a private individual if he were the owner of the land. The cases on that subject are all decided in this way, and the rule appears to me to be settled as I have stated it; therefore, supposing that the commissioners are the owners of the land, they have an undoubted power to do the act as far as their own land is concerned, but under this restriction, they have no right to interfere with the ancient drainage of the lands of a neighbour. The question I have to decide is, whether I can restrain the owner, if an individual were the owner of the lands, either by a perpetual injunction, or by an interim injunction till the question be tried. If the case were one on which there was a bare possibility of a flooding taking

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place, which, according to the evidence of the defendants, would last, perhaps, for a few hours, until the water had time to run off, and that only in cases of violent and excessive rains, it would be a strong thing for this Court to interfere; but if the effect of ordinary, not violent rain, for ten or twelve days consecutively, be (if the drain be made) to flood the land for as many days as the rain falls, then I think there is a case for the interference of the Court.

Taking that to be the reasonable view of the case, I thought it right to advert to the evidence which has been gone into and read without objection, as to what has taken place since the trial, because, since the trial, that very experience has been had, which I was desirous of obtaining before any issue was directed. The trial took place in July 1845, two years after the widening of Lara bridge, and up to that time nothing had occurred which would enable any one to say from experience whether the drainage was sufficient or not. Now, if I am to believe the plaintiff's witnesses, the case will stand thus: some water from the Insewer drain has been used to fall into the main drain above Lara Bridge; but that was to some extent relieved by making a cross ditch from it, which had the effect of carrying away some of the water. It appears that, in August last, immediately after the trial, a great deal of violent rain fell, and the plaintiff has gone into evidence at a considerable length, which, if received without qualification, shews that the theories deduced by the scientific men, the witnesses of the defendants, are completely falsified, because it is proved beyond all doubt, that, not only was the water raised to a great height above Lara Bridge, but the water was so penned back as not merely to affect the water in the main drain, 330 yards above Lara Bridge, where the plaintiff's land commences, but to affect it up to Osgodby village, two miles and a half further up, and thereby to occasion a flooding of the plaintiff's land. When I say that the theories are completely falsified, I say so with this qualification, that

it is possible the same thing might have taken place if the defendants had made no drain at all, or to a very great extent, because this being the first heavy rain which has occurred to try the sufficiency of Lara Bridge, it is possible that the water coming down the main drain may, alone, have been sufficient to choke up Lara Bridge, and cause the flooding. The effect of the evidence was to lead me to an opposite conclusion, viz. that the new drain, if it has not caused, has added, to a great extent, to the evil. The counter evidence of the defendants seems rather to apply to what took place on days earlier in August, and from this to induce the Court to draw the conclusion that no such effect as has been stated on the other side could have been produced on the 19th and 20th of August, than to contradict the evidence given on the part of the plaintiff.

I greatly desired, if I could, to save the parties the expense and delay of going to another trial; but, advertng to the very unsatisfactory nature of the verdict given under the circumstances existing at the trial,—the very important evidence which may be adduced,—the experience which the parties are likely to derive from the approaching winter,—it appears to me that I shall best consult the justice of the case, and take the course most satisfactory to myself by sending this case again to a jury.

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COURT OF QUEEN'S BENCH.

In Trinity Vacation, 1845.

June 19th. THE COMPANY OF PROPRIETORS OF THE KENNET AND AVON CANAL NAVIGATION *v.* THE GREAT WESTERN RAILWAY COMPANY.

By a railway act, 5 & 6 Will. 4, c. cvii, s. 223, it is provided, that no action shall be brought against any person for any thing done, or omitted to be done, in pursuance of the act, unless such action shall be commenced within six months next after the act committed, or in case there shall be a continuation of the damage, then within six months next after the committing such damage shall have ceased.

THIS was an action of debt to recover the sum of £2840. The declaration stated that a certain part of the Kennet and Avon Canal, to wit, a certain part thereof at and near to a certain place called Sydney Gardens, near Bath, in the county of Somerset, heretofore, and after the making of a certain act, (4 & 5 Will. 4, c. cvii), intituled &c., and also, after the making of a certain other act, 1 Vict. c. xci, intituled &c., to wit, on the 15th of November, 1840, became and was, by means and in consequence of the execution of certain works by the last act authorized to be made, to wit, in altering the line or course of the Kennet and Avon Canal, so obstructed, and continued by means thereof so obstructed during a long space of time, to wit, for and during the space of ninety-nine hours then next following, that divers and very many boats, barges, and other vessels,

By a subsequent act, the Company are authorized to alter the course of a canal, provided that if, in the execution of the works, the canal shall be obstructed, the Railway Company shall pay to the proprietors of the canal £10 an hour as liquidated damages during the continuance of the obstruction, and, in default of payment of such sum on demand, the proprietors may recover the same in an action of debt.

The Railway Company, in the execution of their works, obstructed the canal in November, 1840, and June, 1841. In May, 1842, the proprietors of the canal made a demand on the Railway Company for the penalties for the two obstructions, the last of which they described in their demand as having ceased on the 11th of June, 1841. In July, 1842, they brought an action for the said penalties.

Held, that the action was not brought in time, as the limitation of six months for bringing the action began to run from the ceasing of the obstruction, and not from the demand and non-payment of the penalties.

which were then navigating and using the said canal, were thereby, for and during all the time aforesaid, impeded in their passage, and were not, during any part of that time, able freely and uninterruptedly to pass along the same; which said impediment and obstruction did not arise from the neglect or mismanagement of the engineer of the said Company of Proprietors of the Kennet and Avon Canal Navigation, in making the new cut or alteration in the line or course of the Kennet and Avon Canal by the last act authorized to be made, whilst the same was in progress under his superintendence. By means whereof, and by force of the statute &c., the said Railway Company became and was, and still is liable to pay to the plaintiffs a large sum of money, to wit, £1260, being at and after the rate or sum of £10 for every hour during the first seventy-two consecutive hours of the said ninety-nine hours, and at and after the rate or sum of £20 per hour during twenty-seven other consecutive hours, being the residue of the said ninety-nine hours during which the said impediment and obstruction so continued as aforesaid, as and by way of liquidated and ascertained damages; and a demand of payment of which said sum of £1260 was afterwards and before the commencement of this suit, to wit, on 14th May, 1842, according to the form of the statute, &c., duly made on the then treasurer of the said Railway Company; but the said treasurer did not then, nor hath he or the said Railway Company, or any officer of the said Company, at any time hitherto paid the same, or any part thereof; but they &c., whereby, and by force of the statute &c., an action hath accrued.

2nd count, stating a similar obstruction on 7th June, 1841, to recover £1580, for one hundred and fifteen hours' stoppage, averring a demand made on the treasurer 14th of May, 1842.

Plea, nil debet (by statute).

The cause was tried before Mr. Serjeant Atcherley, at

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the Somerset Spring Assizes, 1843, when a verdict was found for the plaintiffs for £2740, subject to the opinion of this Court on the following case.

The plaintiffs were incorporated by an act, 34 Geo. 3, c. xc; and the defendants by an act, 5 & 6 Will. 4, c. cvii.

The present action was brought on the 27th of July, 1842, under the provisions (sect. 21) of an act, 1 Vict. c. xci, intituled, "An Act to alter the line of the Great Western Railway, and to amend the acts relating thereto."

By sect. 1, the powers of the 5 & 6 Will. 4, c. cvii, and of another act, are extended to this act.

Sect. 2 enacts, "that all powers, authorities, and provisions contained in the said recited acts relative to the works thereby authorized, shall extend and apply to the works by this act authorized, and more particularly to empower the said Company to alter and divert (inter alia) the line or course of the Kennet and Avon Canal, within the parishes of Bathwick and Batheaston, or one of them, in the county of Somerset, as in the said act is particularly mentioned."

Sect. 21 enacts, (inter alia), "that, if by reason of any accident or in the execution of any of the works by this act authorized to be made, otherwise than from the neglect or mismanagement of the engineer of the said Company of Proprietors of the Kennet and Avon Canal Navigation in making the new cut or alteration in the line or course of the Kennet and Avon Canal hereinbefore authorized to be made whilst the same shall be in progress under his superintendence, or by reason of the bad state of repair of any such works, or of any of the slopes, banks or walls of the said railway, it shall happen that the said canal, or the towing or footpaths thereof, or any part thereof shall be so obstructed that boats, barges, or other vessels navigating or using the said canal, shall be impeded in their passage, or shall not be able at all times freely and uninterruptedly to pass along the same, then and in every such case the said Railway Company shall pay to the said Company of

Proprietors of the Kennet and Avon Canal Navigation, as or by way of ascertained damages, the sum of £10, at the least, for every hour during which such impediment or obstruction shall continue, and so in proportion for any less time than one hour during which such impediment or obstruction shall continue; and, in case such obstruction shall continue beyond twenty-two consecutive hours, or shall have been occasioned by any wilful act on the part of the servants or persons employed by the said Railway Company, then and in every such case the said Railway Company shall pay to the said Company of Proprietors of the Kennet and Avon Canal Navigation the sum of £20, at the least, for every hour during which such impediment or obstruction shall continue, as or by way of liquidated or ascertained damages, and so in proportion for any less time than one hour during which any such impediment or obstruction shall continue; and, in default of payment of the said sum or sums, (as the case may be), or any part thereof, on demand made on the treasurer, or any officer of the said Railway Company, the said Company of Proprietors of the Kennet and Avon Canal Navigation may sue for and recover the same, together with full costs of suit, against the said Railway Company, by action of debt, or on the case, in any of her Majesty's courts of record at Westminster Provided also, that nothing herein contained shall extend to prevent the said Company of Proprietors of the Kennet and Avon Navigation from recovering against the said Railway Company any special damage that may be sustained by them by means or on account of the explosion of any steam boiler or other injury by any engine or machine on the said railway, or of the acts or defaults of the said Railway Company, in respect of which the lowest amount of the said liquidated damages is so ascertained as aforesaid, although the latter may exceed the amount of such liquidated damages; and they are hereby authorized to sue for and re-

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cover such special damage accordingly; but, in every case where the liquidated damages hereinbefore imposed shall have been paid by the said Railway Company, and any action for special damages shall be brought as last above mentioned, then the said liquidated damages so paid shall be deemed and considered as payments made on account of such special damage, and credit shall be given by the Court before whom such action shall be tried, for all monies so paid by the said Railway Company, and the same shall be deducted from the amount of damages to be recovered by the said Company of Proprietors of the Kennet and Avon Navigation; and, in case the amount of damages so to be recovered shall not exceed the liquidated damages so paid, then and in such case judgment shall be given for the said Railway Company, and no action shall be maintainable by the said Company of Proprietors of the Kennet and Avon Navigation against the said Railway Company for any such liquidated or ascertained damages after judgment shall have been obtained by them for any special damage in respect of the act or acts, default or defaults, for which such liquidated damages would have been recoverable."

The necessary works for directing and altering the line or course of the Kennet and Avon Canal were commenced in June, 1840, and were proceeded with, under and in pursuance of the powers and provisions of the said act, 1 Vict. c. xci.

The stoppages and obstructions mentioned in the declaration took place in the months of November, 1840, and June, 1841, and were proved at the trial so as to warrant the verdict for the plaintiffs for the sum of £2740, unless the defendants are entitled to succeed upon the points, or either of them, made by them as hereinafter mentioned.

By the said act, 5 & 6 Will. 4, c. cvii, s. 216, it is enacted, "that, in all cases in which it may be necessary for any person or corporation to serve any summons or demand, or any notice, or any writ or other proceeding at

law or in equity, upon the said Company, personal service thereof upon a secretary or clerk of the said Company, or leaving the same at the office of the said Company, or of a secretary or clerk, or delivering the same to some inmate at such office of the Company, or at the last or usual place of abode of such secretary or clerk, or, in case the same respectively shall not be found or known, then personal service thereof upon any other agent of, or officer employed by the said Company, or on any one director of the said Company, or delivering the same to some inmate of the last or usual place of abode of such agent or officer, shall be deemed good and sufficient service of the same respectively on the said Company.

Sect. 223 enacts, "that no action, suit, or information, nor any other proceeding of what nature soever, shall be brought, commenced, or prosecuted against any person for any thing done or omitted to be done in pursuance of this act, or in the execution of the powers or authorities, or any of the orders made, given, or directed, in, by, or under this act, unless twenty days' previous notice in writing shall be given by the party intending to commence and prosecute such action, suit, information, or other proceeding to the intended defendant; nor unless such action, suit, information, or other proceeding shall be brought or commenced within six calendar months next after the act committed, or, in case there shall be a continuation of damage, then within six calendar months next after the doing or committing such damage shall have ceased, nor unless such action, suit, or information shall be laid and brought in the county or place where the matter in dispute or cause of action shall arise.

Sect. 224 provides, that the plaintiff in any such action shall not recover after tender of sufficient amends.

An act, passed 2 Vict. c. xxvii, intituled "An Act to amend the acts relating to the Great Western Railway, and

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to raise a further sum of money for the purposes of the said undertaking.”

By sect. 28 of that act, the 216th section of the 5 & 6 Will. 4, c. cvii, is repealed, and in lieu thereof it is enacted, “that, in all cases in which it may be necessary to give or serve any summons or demand, or any notice, or any writ or other proceeding at law, or in equity, or otherwise howsoever, upon the said Company, the same shall be given to or served upon or left at the usual place of abode of the secretary or clerk of the said Company; or in case there shall be no such secretary or clerk, then the same shall be given to, or served upon, or left at the usual place of abode of some one of the directors of the said Company, and such service shall be deemed good and sufficient service on the said Company.”

The plaintiffs proved at the trial, that, on the 14th of May, 1842, a demand in writing (specifying the particulars of the damage), under the common seal of the Canal Company, was personally served upon George Carr Glynn, Esq., the treasurer of the Great Western Railway Company.

That, on the 20th of June, 1842, a notice in writing (also stating the particulars of the damages, the service of the demand, and neglect to comply with it) that an action would be commenced in twenty days from the service thereof, was served upon Mr. Ward, a clerk of the Railway Company, at their office in Prince’s-street, Bank, London. Mr. Ward was a clerk (resident there) in the transfer of shares department, and where the management of the Company is conducted. He had been such clerk from the first commencement of the railway in 1835 or 1836.

There are two secretaries of the Great Western Railway Company, appointed under the powers and provisions and in the execution of the act, 5 & 6 Will. 4, c. cvii. Mr. Saunders is the secretary in London, Mr. Osler in the country.

For the defendants it was objected that the action was not brought in time, and that the limitation clause above set forth applied to the case. And further, that the notice served on Mr. Ward, and the demand served on the treasurer, were not sufficient.

For the plaintiff it was contended that the limitation clause did not apply to the case, and that the right of action arose from the demand on the treasurer; and further, that the demand on the treasurer, and the notice of action, were sufficient, assuming that any notice of action was necessary, and that the proposed defence was not admissible under the plea of nil debet, the clause enabling a defendant to give special matter in evidence under the general issue not applying to the case.

The pleadings, and several acts referred to, are to be taken as forming part of the case.

The question for the opinion of the Court is,—whether the defendants' objections, or either of them, are an answer to the action. If so, a nonsuit or verdict is to be entered as the Court may direct. If not, the verdict found for the plaintiffs is to stand.

Crowder (*Butt* and *Merewether* with him), for the plaintiffs (*a*).—The act 1 Vict. c. xci was passed because it was found necessary to alter the Kennet and Avon Canal, and section 21 was inserted because some inconvenience to the canal was contemplated, the extent of which would not be easily ascertained. It creates the right of action, and it is clear that the railway Company have no power to interfere with the canal but by that clause. Then has the 5 & 6 Will. 4, c. cvii, s. 223, made notice of action necessary? There is no provision in that act as to liquidated damages for penalties. But it only applies to such actions for

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(a) June 3, 1845, before Lord Denman, C. J., Patteson, Williams, and Coleridge, Js.

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which, under section 224, amends may be tendered. [*Patteson*, J.—Section 224 only applies to irregularity or wrongful acts. Section 223 expressly alludes to things done in execution of the act, and therefore lawful.] Then as the 1 Vict. c. xci, s. 1, re-enacts only those provisions of the former act which are applicable to the circumstances, section 223, which applies only to actions for wrongs done, is not re-enacted for this purpose. In *Irving v. Wilson* (a), it was held that, in an action of trespass or tort, revenue officers were entitled to notice under the 23 Geo. 3, c. lxx, s. 30; because they ought to have an opportunity of tendering amends, but not in an action of assumpsit; and its applicability to the latter is also doubted by Lord *Ellenborough*, C. J., in *Wallace v. Smith* (b). See also in *Umphelby v. M'Lean* (c), and *Fletcher v. Greenwell* (d). It is true that, in *Waterhouse v. Keen* (e), a notice of action was held necessary in assumpsit, but that was an action brought to recover from a toll-collector money improperly exacted by him as toll. [*Patteson*, J.—The act 1 Vict. c. xci, s. 21, treats this as a tortious act; for it does not confine the canal Company to the liquidated damages.] Then, if notice of action is necessary, from what time is it to date? The act committed, which is to give rise to the action, is the demand on the treasurer; and therefore the subject-matter of it was substantially tort and was decided upon the principle that notice was requisite to enable the defendant to tender amends. This case comes rather within the principle of *Shatwell v. Hall* (f), not being a thing done by the defendants directly in execution of any of the powers of the act. [*Coleridge*, J.—Section 21 is not confined only to works done in the execution of the act; it contemplates accidents, and gives the damages specifically in debt. It is clear that, if the

(a) 4 T. R. 485.

(b) 5 East, 115.

(c) 1 B. & A. 42.

(d) 4 Dowl. 166.

(e) 4 B. & C. 200.

(f) 10 M. & W. 523.

canal was impeded by the bad state of repair of the works, an action would lie for that.] It is clear that for this they could bring no action but debt. The damages are ascertained by the act itself, as if it were a case of covenant; so that there can be no object in giving the opportunity to tender amends; and therefore, as the case cannot be brought within the mischief to be remedied by the limiting section, such notice is not required. Even if a notice were necessary, it would date not from the obstruction, but the demand on the treasurer, which the legislature clearly contemplated as the act committed. [*Patteson, J.*—The act done is the obstruction arising from one of three things. Suppose the canal Company had chosen to proceed for unliquidated damages, can any one say they would not have been limited then?]

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M. D. Hill (*Carrow* with him), *contra*.—There is nothing in the language of these acts to get rid, in such a case as this, of the evident intention to limit the time of bringing actions. In no case would such protection be more needed, as even fractions of hours might become important; and much would depend on the circumstances being fresh in the memory of the witnesses. If the demand is to be the foundation of the action, no time would protect the defendants. It has been intended that this is made a mere matter of contract by the act, on account of the difficulty there would be in ascertaining the amount of damage. But nothing could be easier than to ascertain the amount of traffic, and number of boats detained. The penalties were imposed, not for the protection of the canal Company, but the public. The matter, therefore, does not lie in contract between the two Companies; the *jus tertii* intervenes. If the Companies agree, the public are not to be without remedy. [*Coleridge, J.*—They would still have the right to indict.] Then two parties clearly cannot contract to do that which is the subject of indictment. The

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protection given by the 4 & 5 Will. 4, c. cvii, s. 223, is of the largest kind, and the limitation as to time is in the fullest terms. The declaration and case both state these obstructions to have been done in execution of the powers of the act, and therefore to be *à fortiori* protected. Then the 1 Vict. c. xci, s. 1, incorporates in terms the 223rd section of the former act, except when it is repugnant, and there is nothing in it repugnant to the 21st section, the latter part of which distinctly shews that it is not confined to the penalty. The cases cited do not affect the principle. In *Irving v. Wilson* (a), and *Wallace v. Smith* (b), the test was bona fides. In *Umphelby v. M'Lean* (c), there was no act done, and the words of the act were precise. In *Waterhouse v. Keen* (d), the Court laid down the true principle, that the nature of the claim, rather than the form of action, was to be looked to, and that is confirmed by *Shatwell v. Hall* (e), and the class of cases where it is held that such Companies are not protected in their capacity of carriers, not being bound to be so: *Palmer v. The Grand Junction Railway Company* (f), *Carpue v. The London and Brighton Railway Company* (g). It is not unusual to create penalties for offences to be recovered by action of debt, and the protection was clearly intended by the act. There might be payment into Court upon one count of the declaration (h).

Crowder, in reply.—The notice of action was to protect parties who, intending to act under the statute, do something beyond it. This was literally and properly within it. If such a matter had been intended to be included, there would have been a special reference to it.

Cur. adv. vult.

(a) 4 T. R. 487.

(b) 5 East, 122.

(c) 1 B. & A. 42.

(d) 4 B. & C. 200.

(e) 10 M. & W. 523.

(f) 4 M. & W. 749.

(g) Antè, Vol. 3; 5 Q. B. R. 747.

(h) Tidd, 541.

Lord DENMAN, C. J., now delivered the judgment of the Court.—This was an action of debt to recover a certain amount of liquidated damages as compensation to the plaintiffs for impediment and obstruction to the traffic upon the canal, by certain operations of the defendants for the improvement of their railway. The plaintiffs were incorporated by an act passed in the 34 Geo. 3, c. xc; and the defendants, by the 5 & 6 Will. 4, c. cvii, under the powers of which their railway was constructed. By the 6 Will. 4, c. xxxviii, the defendants were enabled to alter their line of railway, and a further power, with the like effect, was given them by the 1 Vict. c. xci. The works, by which the alleged damage to the plaintiffs arose, were carried on under the authority of the latter act; and the following statement, which is contained in the case, renders it unnecessary to describe them more particularly:—"The stoppages and obstructions mentioned in the declaration took place in November, 1840, and in June, 1841, and were proved at the trial so as to warrant a verdict for the plaintiffs for the sum of £2740, unless the defendants are entitled to succeed upon the points, or either of them, made in their defence."

The action, it appears, was brought on the 27th of July, 1842, and the points to which reference was thus made were several. The most material, however, and that to which alone it is needful to refer, was, that the action was brought too late. Now, the 223rd section of the 5 & 6 Will. 4, c. cvii, contained the following provisions:—"That no action, suit, or information, or any other proceedings of what nature soever shall be brought, commenced, or prosecuted against any person for any thing done or omitted to be done, in pursuance of this act, or in execution of the powers or authorities, or any of the orders, made, given in or directed by or under this act, unless (amongst other things) forty days' previous notice in writing shall be given

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by the party intending to commence and prosecute such action, suit, information, or other proceeding to the intended defendant; nor unless such action, suit, information, or other proceeding shall be brought or commenced within six calendar months next after the act committed, or in case there should be a continuation of damage, then within six calendar months next after the doing and committing the damage shall have ceased." And, by the 1 Vict. c. xci, s. 1, it is enacted, "that all the powers, authorities, provisions, directions, penalties, forfeitures, payments, exemptions, regulations, clauses, matters and things contained in the said recited acts, 5 & 6 Will. 4, c. cvii, and the 6 Will. 4, c. xxxviii, or either of them, except such of them, or such parts of them, respectively, as are by the said act, 6 Will. 4, c. xxxviii, or by the said act, 1 Vict. c. xci, repealed and altered, or otherwise provided for, shall extend and be construed to extend to the said act of 1 Vict. c. xci, and to the several works and things thereby authorised or required to be made or done, and shall operate and be in full force in respect of the objects and purposes of the said last-mentioned act, as fully and effectually as if the same powers, authorities, clauses, matters, and things were repeated and re-enacted." It is likewise necessary to add, that by neither of the acts are the provisions of the 223rd section above cited further altered, and that therefore they are applicable to the present case.

The question, therefore, is, whether the action was brought in time or not. For the plaintiffs, it was contended, either that there was no act done to which reference can be made so as to fix the commencement of the six calendar months, and therefore the case is not within the 223rd section of the 5 & 6 Will. 4, c. cvii; or, if the demand be not in itself the cause of action, it is, at least, the date from which the six calendar months are to be reckoned. We think, however, the latter part of the sec-

tion in question, and particularly the words, "in case there shall be a continuation of damage, then within six calendar months next after the doing or committing of such damage shall have ceased," plainly allude to a case of this description. The very statement of the grievance in the declaration fixes the date for its termination; ninety-nine hours are the contemplated period during which the said impediment and obstruction continued, and for which compensation is sought by this action. Whether, therefore, the grievance arose from something done or omitted by the defendants, the grievance was an impediment and obstruction which is described as having ceased, and which is stated in the case to have in fact ceased in the month of June, 1841. We are, therefore, of opinion, that the impediment, which ended as above-mentioned, must be considered as the cause of action. A demand may, indeed, be necessary to maintain an action, but it cannot be considered as the cause of it, nor, indeed, was it contended for in the argument for the plaintiffs.

We are of opinion, therefore, that this action, which was commenced in July, 1842, was brought too late, and it becomes unnecessary to notice the other objections which were raised on the part of the defendants.

Judgment for the defendants.

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*In Trinity Vacation, 1845.**June 27th.*

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By a Navigation Act, 3 Vict. c. lv, it is provided, that no act of the commissioners thereby appointed shall be valid unless done at a meeting of the commissioners, and all the powers of the act shall be executed by the majority of the commissioners present at a meeting, not less than three being present. Sect. 12 provides that they shall and may be sued in the name of their clerk.

A resolution had been

passed by the commissioners that their engineer should prepare specifications, with a view to a contract for the performance of certain works, and that tenders should be received for them. At a meeting at which seven of the commissioners were present, they unanimously resolved to accept a tender made by B. The contract was prepared by their secretary, and signed by B. Three commissioners only were named in the contract as parties to it, and by none of these was it executed. It contained a clause that all such parts of the work as were not specified in the contract or plans should be executed in such manner as the surveyor of the works should direct.

In the construction of the work, B. had occasion to move back a bank, which he re-erected of insufficient materials. Water was prematurely admitted, which sunk the bank, and went over it into the plaintiff's land.

Held, that the contract, and work done under it, were acts done by the commissioners, for which they might properly be sued in the name of their clerk.

But that the injury having arisen from the imperfect construction of the bank, which was part of the work specified in the contract, the contractor, and not the commissioners, was liable for the damage.

THIS was an action on the case against the defendant as clerk to the commissioners of the Dartford and Crayford Navigation. The declaration, stating the commissioners to be sued in the name of their clerk, in pursuance of the statute 3 Vict. c. lv, intituled, "An Act for improving the Dartford and Crayford Creeks in the county of Kent, and for making a diversion in the line of the said Dartford Creek and other works connected therewith," continued as follows: "That before and at the time of the committing &c. the plaintiff was and still is lawfully possessed of divers, to wit, — — acres of land, situate &c. That, after the passing of the said act of Parliament, and whilst the plaintiff was so possessed &c., and before the committing &c., to wit, on &c., the said commissioners, under the said act, made a diversion in the line of the said Dartford Creek, and there executed divers works, incidental to the making of the said diversion; and it then was the duty of the commis-

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sioners to use and exercise reasonable care, skill, and diligence in the making of the said diversion and the execution of the said works; yet the said commissioners did not, in the making of the said diversion and the execution of the said works, use or exercise reasonable care, skill, and diligence, but, on the contrary thereof, to wit, on &c., made the said diversion, and executed the said works, in so careless, unskilful, negligent, and improper a manner, that, by reason and in consequence of the want of such reasonable care, skill, and diligence, in the making of the said diversion and the execution of the said works, and from no other cause whatever, heretofore, to wit, on &c., divers great quantities of water, to wit, &c., flowing in the line of the said diversion, and which, if reasonable care, skill, and diligence had been used and exercised by the said commissioners in the making of the said diversion and the execution of the said works, would then have continued to flow in the said line, burst, ran, and broke through the embankments and sides of, and from and out of the said line, and then, with great force and violence, rushed into, through, and upon, and overflowed the said lands of the plaintiff," &c.

Pleas.—1. That the said commissioners are not guilty.
2. That the said commissioners did not make the said diversion or execute the said works incidental to the making of the said diversion, or any part thereof, in manner and form &c. Issue thereon.

At the trial, before Lord *Denman*, C. J., at the Kent Spring Assizes, 1844, the secretary of the commissioners proved that a resolution was passed by them directing their engineer to prepare a specification for certain works which they wished to have executed, and that various persons (including a man of the name of Button) were invited to send in tenders for the execution of the works. Tenders were sent in accordingly; and, at a meeting of the commissioners, at which seven were present, they unanimously resolved to accept the tender sent in by Button.

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The secretary prepared the contract, and was the subscribing witness to its signature by Button, the contractor. Three commissioners were named in the contract as parties to it, but none of these executed it. It contained a clause, "that all such parts of the work to be done by Button as were not in a particular manner specified and described in the contract or the plans and specifications, shall be executed in such manner as the surveyor of the said works for the time being shall direct, and in a good and workmanlike manner," under certain penalties. Button did the work under the contract, including the removal of a bank, which was specified and described in it, which bank he re-erected of insufficient materials; and, afterwards, let the water in prematurely, which sunk the bank and went over it into the plaintiff's orchard. It was no part of the contract that he should let in the water.

It was contended for the defendants, that it was not shewn that the works in question were made by their order, or that they had adopted them so as to come within sect. 5 of their act, (3 Vict. c. lv); by which it is enacted, "that no act of the said commissioners shall be valid unless made or done at some meeting to be held by virtue of this act; and all the powers and authorities by this act granted to or vested in the said commissioners shall and may, from time to time, be executed by the majority of the said commissioners present at any meeting to be held under this act, the number of commissioners present at such meeting not being less than three." That, inasmuch as the contract was not signed by a majority of the meeting, the commissioners generally were not liable for any thing done under it, and could not be sued in the name of their clerk.

Secondly, That the declaration alleged the injury to have been caused by the imperfect construction of the works, whereas it was caused by the contractor's improperly letting in the water, which he was not authorised to do.

Thirdly, That the commissioners were not liable, either

at common law or under the act, for the imperfect construction of the works by the contractor, who was not their servant, and was therefore the only person liable.

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The Lord Chief Justice directed the jury that the commissioners were liable, if the injury to the plaintiff's land arose from the negligence of the contractor in the unskilful performance of the works, which he had executed under the contract; but that, as the letting in of the water was no part of his duty under the contract, they should find for the defendant if the injury arose from the improper letting in of the water by the contractor.

The jury found a verdict for the plaintiff. In the following Easter Term Sir *F. Thesiger*, Solicitor-General, having obtained a rule nisi to enter a nonsuit, or for a new trial on the ground of misdirection,

Channell, Serjt., *Shee*, Serjt., and *Wordsworth*, shewed cause (a).—1. The commissioners are liable on this contract, nor was it necessary that it should be signed by any of them, provided they adopted it. It is not imperative that every formality required by the act should be complied with; if it were, it would be impossible at the same meeting to act in strict conformity with section 14, which gives power to the commissioners, their engineers, contractors, agents, and workmen, to enter lands, and do certain works there. Here the commissioners accepted the tender, authorised the preparing of the contract, and adopted the work when completed. The work, therefore, was executed under the authority of the act; and they are properly sued in the name of their clerk, and cannot now object that the contract is not binding, because three only of the commissioners are named in it. Those three must be taken to have acted for the whole body, and are competent to do so, as by section 75 three

(a) April 24th, 1845, before Lord *Denman*, C. J., *Patteson*, *Williams*, and *Wightman*, Js.

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may execute a mortgage-deed of the tolls. 2. The answer to the second objection is, that the jury have found that the injury was caused by the imperfect construction of the work for which the commissioners contracted. 3. *Rapson v. Cubitt* (a), and the authorities cited there, shew that, if Button, though a contractor, stood in the relation of servant to the commissioners, they are liable for damage caused by his negligence.

Peacock, contra.—The plaintiff ought to have been nonsuited, as there was no evidence to support the declaration. It charges the commissioners, as a public body, with negligence in the performance of works done under their act; in which case, by section 12, they may be sued in the name of their clerk. But there is no evidence to connect the commissioners generally with the works in question; if so, any three individual commissioners who were made parties to the contract, though they were not present at the meeting where the question of the tenders was decided, might bind the whole body. But that is not so; according to section 5, no act of the commissioners is valid unless done at some meeting of the commissioners, not less than three being present. This contract, therefore, should have been signed at such a meeting, and as it was not so signed, the commissioners are not responsible.

2. The grievance, as stated in the declaration, is not proved. If the contractor was employed by the commissioners, the employment was to make the bank, not to let in the water. That was his own unauthorised act. [*Patteson, J.*—We must take the jury to have found that the injury was not caused by letting in the water, but from the way in which the bank was constructed.]

3. Button was not the servant of the commissioners, but the contractor to do the work, and is therefore answerable for his own negligence.

Cur. adv. vult.

(a) 9 M. & W. 710.

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LORD DENMAN, C. J., now delivered the judgment of the Court.—This case, tried before me at the Lent assizes for the county of Kent in 1844, presented some difficult questions. A rule was obtained for a nonsuit, because the action was not properly brought against the clerk to the commissioners. The 12th clause of the 3 Vict. c. lv, requiring the clerk to be made a party in respect of the acts of the commissioners, merely enacts, “that they shall and may be sued in the name of their clerk.” No description is given of the nature of the acts for which he is to be sued: but it was argued, that they must be such as are performed by them in the execution of their powers; and then recourse was had to sect. 5, which enacts, “that no act of the commissioners shall be valid, unless done at some meeting of the commissioners, not less than three being present.” Now, the thing done, of which the plaintiff complained, grew out of the execution of a contract thus proved by the witnesses. The secretary of the Company stated some proceedings of the Company in September, October, and November,—a resolution that their engineer should make specifications, with a view to a contract; that Button should be written to on the subject, and that Button’s tender should be accepted. The contract was prepared by the witness (no doubt from authority, though he did not recollect how given). He was the subscribing witness to its subsequent execution by Button. At the meeting, where the resolution for accepting the tender passed, seven commissioners were present; three only were named in the contract as parties to it, and by none of these was it executed. The work was done by Button under this contract, and there was no other.

For want of signing the contract, it was argued that the commissioners were not liable in that character for anything done under it, and, consequently, could not be sued by their clerk. But we are of opinion that the contract so agreed upon by the majority at a regular meeting was

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made in execution of their office, and that work done under that contract may be work done by them as commissioners; so that the defendant may be properly sued as their representative, assuming that in other respects they are liable.

The grievance was the overflowing of the plaintiff's orchard by drains imperfectly made. A bank, placed at first too close to an extensive excavation, had been moved backward, but was re-erected of insufficient materials, water was prematurely admitted, which sunk the bank and went over it into the plaintiff's land. If a proper cess had been made, the evidence was that the water might have passed away without injury to the plaintiff. All this was done by Button the contractor; and the defendant contended, that it was not in execution of the works contracted for.

I directed the jury that the commissioners could not be liable, unless the damage was done in execution of the contract, stating my opinion that there would be a want of skill or care in being taken by surprise by a bad vein of soil, and not making the banks sufficiently strong to resist the water; but that, if the improper introduction by Button of the water had caused the injury, that was not done by their authority, and that they were not liable in this action.

The jury found for the plaintiff, and, we think, properly, on that point. It now seems to us, that, if the bank was in itself insufficient and unskilfully constructed, the maker of it is liable for the damage done, though that may have been directly caused by something wrong proceeding from another; and hence, that, if the commissioners constructed a weak and dangerous bank, they would be liable for the damage done by water improperly let in, whether by their servant, or by a stranger, or by some natural accident.

Supposing this to be true, we are then brought to the question, whether the commissioners are responsible for

this ill construction,—whether the contractor is to be regarded as their servant, so that they may be called the makers of this work by his agency. On a careful reference to *Laugher v. Pointer* (a), in which the opinions delivered by Lord *Tenterden*, C. J., and *Littledale*, J., must be taken to lay down the correct law, to *Randleson v. Murray* (b), *Quarman v. Burnett* (c), *Milligan v. Wedge* (d), and *Rapson v. Cubitt* (e), it seems perfectly clear, that, in an ordinary case, a contractor to do works of this description is not to be considered as a servant, but as a person carrying on an independent business, such as the commissioners were fully justified in employing to perform works which they could not execute for themselves, and who was known to all the world as performing them. We find here none of the reasons which have prevailed in cases where one person has been held liable for the acts of another as his servant. The learned Judges who thought the defendant liable in *Laugher v. Pointer* (a) might, without inconsistency, have held that these commissioners are not liable. The doubt is raised by the contract, which expressly requires that all such parts of the said work to be done by Button as are not in a particular manner specified and described in the contract, or the plans and specifications, shall be executed in such manner as the surveyor of the said works for the time being shall direct, and in a good and workmanlike manner; and such execution of the work is secured by penalties. This passage of the agreement would appear to take power from the contractor, and keep it in the hands of the commissioners or their surveyor; but, whatever may be its proper construction or effect, it has no application to the present case, for the bank which failed is a part of the works so specified and described,

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(a) 5 B. & C. 547.7

(b) 8 A. & E. 109.

(c) 6 M. & W. 499.

(d) 12 A. & E. 737.

(e) 9 M. & W. 710.

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and for which, therefore, if ill done, the contractor is liable, and the commissioners are not. We are, therefore, of opinion that the rule for a nonsuit must be absolute.

Rule absolute.

In Michaelmas Term, 1845.

Nov. 13th. THE QUEEN v. THE NORWICH AND BRANDON RAILWAY COMPANY.

By a Railway Act, 7 Vict. c. xv, s. 241, a Company were required to construct a bridge over the river Y., so as to leave the same width of waterway under the same as then existed at the point where the river was crossed, and so that there should be a clear height of five feet above the ordi-

IN Michaelmas Term, (8th November), 1844, *Cleasby* had obtained a rule nisi calling upon the defendants to shew cause why a writ of mandamus should not issue directed to them, commanding them to construct and make, or cause &c., a certain bridge, for carrying their railway over the river Yare, at the hamlet of Lakenham, in the county of the city of Norwich, so and in such manner as to leave the same width of waterway under the same as existed at the time of the passing of the act of Parliament of the 7th Vict. c. xv, intituled "An Act for making a railway from Norwich to Brandon, with a branch to Thetford,"

provided that, after notice given to the Company by any owner or occupier of lands adjoining the railway, that the said bridge was not made according to the true intent and meaning of the act, it should be lawful for such owner or occupier to apply for and obtain an order from a justice of peace enabling such person to make such bridge accordingly, the expenses to be defrayed by the Company.

The Company were constructing a bridge which did not comply with either of the above provisions, whereupon a landowner gave them notice requiring them to construct a bridge leaving the former width of waterway, and the clear height of five feet above the water, in the terms of the act. The Company replied, that they would do the first, and would accept process as to the second. They afterwards made the bridge the required height, and, to preserve the same width of waterway, commenced cutting the banks of the river, which they afterwards discontinued. To subsequent applications to proceed with the work they returned no answer.

Held, that the above facts amounted to a refusal to do what was demanded, and that the applicant was entitled to a mandamus, notwithstanding the powers given him of applying to a justice.

at the point where the said river is crossed by the said bridge.

It appeared, from the affidavits upon which the rule was obtained, that a mill, called the Lakenham Yarn Mill, situate at Lakenham, had been demised by E. W. Trafford, Esq., to the Norwich Union Life Insurance Society; and that, by a clause in the Railway Company's Act, s. 241, it was enacted, that, in making the railway through the estate of the said E. W. Trafford, the said Company should (among other things) construct and keep in repair the bridge for carrying the railway over the river Yare, so as to leave the same width of waterway under the same as at the time of the passing of the act existed at the point where the river would be crossed, and so that there should be at all times a clear height of five feet above the ordinary level or usual watermark of the river under such bridge, for the passage of boats; and if, at any time after notice in writing should be given to the said Company, by or on behalf of any owner or occupier of lands adjoining or lying near to the said railway, that the said bridge, or any part thereof, was not made, maintained and repaired according to the true intent and meaning of the act, it should be lawful for any such owner or occupier, from time to time, as often as there should be occasion, to apply for and obtain an order in writing from any one or more justice or justices of the peace for the city of Norwich and county of the same city; and the said justice or justices was and were thereby authorized and required, at his or their discretion, to grant such orders as aforesaid, enabling such person to make and repair such bridge accordingly, and the reasonable expenses thereof (to be ascertained by the said justice or justices) should be defrayed by the said Company; and in case of neglect or refusal to satisfy and defray such expenses for the space of fourteen days after demand thereof made upon the said Company, such expenses should and might be recovered and levied by such

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owner or owners, occupier or occupiers, in such manner as any other money was by the act directed to be recovered from the said Company (a).

That, in August, 1844, the Company commenced building a bridge over the river, about 1000 yards from the mills, without giving notice to the Insurance Society of their intended works. That, on the 10th of September, the directors of the Insurance Society ascertained that the bridge was supported by twenty-eight piles, each about thirteen inches square, driven into the river, and standing in eight lines across the waterway, and that the longitudinal beams of the bridge were fixed so as to leave a height of three feet ten inches only above the ordinary surface of the water. That the Insurance Society forthwith served a notice on the Railway Company, requiring them to construct the said bridge so and in such manner as to leave the same width of waterway under the said bridge as at the time of the passing of the said act existed at the point where the river was crossed by the railway, and so and in such manner as that there should be at all times a clear height of five feet above the ordinary level or usual watermark of the river, under such bridge, for the

(a) Section 242 enacts, "That, subject to the provisions and restrictions contained in this act, it shall be lawful for the Company, for the purpose of constructing the railway, to execute (amongst others) the following works: they may alter the course of any rivers not navigable, canals, brooks, streams, or watercourses, and of any branches of navigable rivers, such branches not being themselves navigable, if necessary, for constructing and maintaining tunnels, bridges, passages, or other works over or under the same; and divert or alter, as well temporarily as per-

manently, the course of any such rivers or streams of water, roads, streets, or ways, or raise or sink the level of any such rivers, &c., in order the more conveniently to carry the same over or under or by the side of the railway, as they may think proper;—provided always, that, in the exercise of the powers hereby granted, the Company shall do as little damage as can be, and shall make full satisfaction in manner herein provided to all parties interested, for all damages by them sustained by reason of the exercise of such powers."

passage of boats ; and they at the same time gave the Railway Company notice that the piles and timbers there placed across the river were an impediment to the free and regular passage of the water to their mills, and diminished the accustomed width of waterway, and did not leave a clear height of five feet above the level of the river.

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On the 21st of September, an answer was sent by the solicitors of the Railway Company, stating that the above notice had been received, and informing the Insurance Society, that, with reference to that part of it which applied to the height of the bridge above the surface of the water, it was the intention of the Company to make it of the clear height of five feet, as required by the act ; and also stating, that they (the solicitors) were instructed to accept service of any process which the Insurance Society might think proper to institute against the Company in relation to the other matters referred to in the aforesaid notice. The Insurance Society thereupon, on the 25th of September, wrote again to the solicitors for the Railway Company, stating that they were not satisfied with such a partial compliance with the Society's requisition, but insisted on the waterway being left of the former and accustomed width, and the bridge constructed according to the letter and meaning of the railway act in every respect. No reply having been received to this letter, on the 21st of October another letter was sent to the solicitors of the Railway Company, admitting that the Company had raised the bridge, as required by the notice, but stating that no alteration had been made in the construction of the bridge in other respects, either as regarded the width of the waterway, or its preventing or interfering with the passage of boats, and inquiring whether the Railway Company intended to comply with the requisition in these particulars, or to try the question as the work then stood. To this, also, no reply was ever received.

The affidavits in answer stated, that, in October, 1844,

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directions had been given to the engineer of the Company for widening the river at and under the site of the said bridge, by a cutting on the west side thereof, to be laid into and united with the original stream, to be of the average depth of six feet, and of the width of fifty feet on the north side of the bridge, and increasing to sixty-six feet on the south side, and continued on each side of the bridge so as to join the original banks of the stream, without making any angle; that some delay occurred, in consequence of collecting materials, and other reasons; that the said cutting was commenced on the 27th of October, but was stopped by floods early in November, and the works were suspended in consequence of the water; but that it was intended, so soon as the weather and state of water would allow the cutting to proceed, to go on with and complete the same. It was also stated, that, while the cutting was proceeding, several persons from the mills came and viewed it, and that, after the orders for widening the river had been given, but before the works were actually commenced, the tenant of the mills in question was informed by the sub-contractor of the railway that such orders had been given.

Gurdon now shewed cause.—First, there has been no sufficient refusal by the Company here to entitle the applicant to a mandamus. They have complied with one requisition, which they could do immediately, and were ready to proceed, if the floods would have permitted them. There must be a specific demand and refusal, or a course of conduct amounting to a refusal, *Rex v. The Brecknock and Abergavenny Canal Company (a)*, *Rex v. The Wilts and Berks Canal Company (b)*; and a demand during the progress of the works will not dispense with a specific demand to do what is required after they have been completed in

(a) 3 A. & E. 217.

(b) *Id.* 477.

a manner disapproved of: *Regina v. The Bristol and Exeter Railway Company* (a).

Secondly, a mandamus will not be issued if there is any other specific legal remedy. That is given by sect. 24 of this act, which was inserted specially for protecting the interests of Mr. Trafford and his lessees. That section entitles them to apply to a justice of the city of Norwich, and to obtain an order from him to enable them to make the bridge themselves.

Thirdly, sect. 242 empowers the Company to divert rivers; and, for any damage in so doing, the remedy is by a compensation jury under the act, and not by mandamus.

Sir *F. Kelly*, Solicitor-General, (*Cleasby* with him), contra.—The case is stated as if there had been no refusal, and the Company were proceeding to do what the act requires. But there has been a clear and absolute refusal, and there has been no premature interference with them. The provisions of sect. 241 are twofold: 1. The bridge is to be built a certain height above the level of the water; 2. The waterway is to be the same width as before. The act received the royal assent in May, 1844. After that, the Company, without notice to the Insurance Society, proceeded to make the bridge, and the first notice of it was the injury done to the mill. The bridge was not of the height required by the act, and, instead of leaving the waterway unincumbered, it was built on twenty-eight piles, so that the current was obstructed, and the navigation stopped. Then a twofold application was made to them, to the first of which they answered that they would do it; to the second, that they would accept process. This is not like the cases cited, where there was either an ambiguous correspondence, or the selection of the wrong person. Even

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(a) *Antè*, Vol. 3, p. 433; 4 Q. B. R. 162.

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if the engineer had received an order to do the works which are going on, the applicant would still have a right to come for a mandamus ; and, if they are properly done, that would be a good return to the writ. It is no remedy to obtain an order from a justice ; the object of the application is to make the Company build the bridge. [*Patteson, J.*—It would be rather absurd if a person was to have no other remedy than to pull down the bridge, and build up a new one himself.] Then this case is not within the general enactment as to bridges in sect. 242, but is the subject of special provision, under sect. 241. [Here they were stopped by the Court.]

PATTESON, J.—I do not mean to express any opinion as to the term “ same width of waterway,” whether it means that the Company shall throw a single arch over the river, so as to leave the channel untouched, or that they may widen the river to the extent of the width of the piles, and so keep the same width. But I think this rule must be absolute, for this reason. Here is a letter written by the solicitor of the Railway Company, in answer to a notice which was sent to them by the Insurance Society, complaining of and requiring two things : first, that the bridge should be made so as to leave the same width of waterway under it ; and, secondly, so as to leave a clear height of five feet above the level of the river for the passage of boats. The answer of the solicitor of the Company is, that they will make the bridge of the required height, but that, as to the other matters, he will accept service. If that latter part is not a refusal by the Company, I do not know what is to be considered a refusal. Then, undoubtedly something is afterwards done by the Company towards removing the obstruction in one respect ; but then two other letters, on the 25th September and 21st October, are sent by the Insurance Society to the solicitor, to each of which, no doubt

instructed by the Company, he makes no answer. If these Companies will take upon themselves to treat people with such contempt, they must take the consequences. I cannot help them.

Rule absolute.

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THE QUEEN v. THE LONDON AND BLACKWALL RAILWAY
COMPANY.

Nov. 22nd.

AT the time of making the London and Blackwall Railway in 1840, Mr. Walker was the owner of a house in St. George's in the East, and the railway passing within fifty feet of his premises, and thereby injuring them, he required the Company, by notice in writing, under section 51 of their act (6 & 7 Will. 4, c. cxxiii (a)), to purchase his pre-

By a Railway Act, 6 & 7 Will. 4, c. cxxiii, a Company are empowered to take lands, &c. making compensation to the owners, such compen-

sation, in case of disagreement, to be assessed by a sheriff's jury. Sect. 27 provides, that, where the jury shall give a verdict for the same or a greater sum than shall have been offered by the Company for the purchase of land, or compensation for damage, the costs of the inquiry shall be defrayed by the Company, and that such costs shall be determined by the sheriff, and in default of payment may be recovered by distress. By sect. 37, the costs of deducing title to any lands purchased or taken by the Company for the purposes of the act, are to be borne by the Company; and, by sect. 38, in case of disagreement as to the amount, the same shall be ascertained by the Court of Exchequer, who may refer them to one of the Masters of that Court for taxation, and, after such taxation, may order the amount to be paid.

Semle, that sect. 27 only applies to a case where the Company compel the owner of property to sell, or accept satisfaction for damages, (see *Corregal v. The London and Blackwall Railway Company*, antè, Vol. 3, p. 411), and not to the case of an owner, who, (under other sections of the act), has given notice to the Company to take his property, and issued his precept to the sheriff to summon a jury to assess compensation.

But *held*, that an application for a mandamus by such owner, in such a case, was at all events premature, until the costs of the inquiry had been ascertained by the sheriff, and attempted to be levied by distress, and the costs of title taxed in the Court of Exchequer, being the specific modes pointed out by the act.

(a) See *Regina v. The Sheriff of Middlesex*, antè, Vol. 3, p. 396, where the facts and notices, and the sections of both the acts are set out. The two following sections of the first act are also material:—

Section 37 enacts, "That all the costs, charges, and expenses, on the part as well of the seller as

the purchaser, of all conveyances and assurances of any lands which shall be purchased or taken by the said Company for the purposes of this act, and of deducing, evidencing, and verifying such title as the Company may require to the said lands, and of making out and furnishing such abstracts and such

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mises, and make compensation for the loss of lease, goodwill, &c. Thirty days after giving this notice, he, under

attested copies as the said Company may require, and all expenses whatsoever incident to the investigation, deduction, and verification of such title, shall be exclusively borne and paid by the said Company; and the said Company, before entering into possession of the lands so purchased or taken, shall pay the amount of such costs, &c., or, in case there shall be any dispute about the same, shall obtain such order as hereinafter mentioned, and shall deposit, for the purpose of paying the same, in such manner as hereinafter mentioned, the amount of the costs, &c., claimed by the party or parties from whom the lands shall be purchased or taken; provided always, that the said Company shall not be prevented from entering into possession of the lands so purchased by reason of the nonpayment of the said costs, &c., or by reason of the order hereinbefore mentioned not having been obtained, or the deposit herein mentioned not having been made, unless the party or parties from whom such lands shall have been purchased shall, within seven days after notice in writing for that purpose shall have been given to them by the said Company, deliver a bill of their said costs, &c., to the said Company."

Section 38 enacts, "That if the said Company and the party and parties aforesaid cannot agree as to the amount of such costs, &c., the same shall be ascertained by the said Court of Exchequer; and it shall be lawful for the said Court,

on petition to be presented by the said Company, to order and direct that such costs, &c. shall be referred to one of the Masters of the said Court to be taxed in the usual manner, and such order shall be served on the party or parties aforesaid, who shall be at liberty to proceed under the same; and, after taxation of such costs, &c., it shall be lawful for the said Court to order and direct that the amount at which the same shall be so taxed, together with the costs, &c., attending the taxation thereof, or so much of the same as shall be payable by the said Company to the person or persons from whom such lands shall have been purchased or taken as hereinafter mentioned, shall be paid to the person or persons aforesaid; and the said money so deposited as aforesaid shall be applied, under the direction of the said Court, towards the payment thereof, so far as the same will extend; provided always, that the said Company shall not be at liberty to enter into possession of the lands so purchased or taken, until an order shall have been made for the taxation of the said costs, &c., and the said Company shall have deposited the sums claimed in respect of the same in the Bank of England, in the name and with the privity of the Accountant-General of the said Court of Exchequer, to be placed to his account there, ex parte "The Commercial Railway Company," pursuant to the method prescribed by the hereinbefore mentioned act passed in

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the same section, by notice in writing, required the Company to issue their warrant for summoning a jury for the purpose of submitting the question in dispute to their determination, giving the particulars of his claim as before. The Company having disregarded both these notices, he caused his precept to be served on the sheriff of Middlesex requiring him to impanel a jury to determine and assess such compensation under the 22nd section of the 2 & 3 Vict. c. xcv, an act extending the provisions of the former act.

A jury was accordingly impanelled on the 27th of August, 1841, but, an objection being taken to the jurisdiction, the sheriff refused to proceed with the inquiry.

In Michaelmas Term, 1841, application was made to the Court of Queen's Bench for a rule for a mandamus to the sheriff of Middlesex to impanel, summon, and return a fresh jury for the purpose of determining the matters in dispute between Samuel Walker and the London and Blackwall Railway Company. This rule in Michaelmas Term, 1842, was made absolute (a).

A jury was accordingly impanelled on the 27th of March, 1843, and delivered their verdict that the premises of Mr. Walker were deteriorated in value by the works of the Railway Company, and they assessed the value of the lease and goodwill of the premises at the sum of £2000, of the loss by removal at £200, the fixtures to be taken at a valuation. These sums were paid by the Company, whereupon an application was made to them by Mr. Walker for

the first year of the reign of his late Majesty King George the Fourth, which sums shall be applied, under the order of the said Court, in payment of the said costs, &c.; provided always, that the expense of determining such costs, &c., as aforesaid, and of obtaining the order or orders referring the same to be taxed, shall be paid and borne by the said Company, unless one-

sixth of the said costs, &c. shall be disallowed; in which case the said expenses shall be paid and borne by the person or persons from whom the said lands were purchased or taken, and the amount thereof may then be paid to the said Company out of the said sum so deposited by them as aforesaid."

(a) See *Regina v. The Sheriff of Middlesex*, antè, Vol. 3, p. 396.

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the payment of his costs and expenses in preparing the evidence in support of his claim upon that and the previous inquiry, and also in deducing and making out his title to the premises. It did not appear that the jury had been called on to assess the costs of the inquiries under section 27 of the act (6 & 7 Will. 4, c. cxxiii (a)), nor that the costs of making out the title had been ascertained by the Court of Exchequer, as directed by section 38, though it did not appear that any objection was made on that ground at the time of the application for payment.

A rule nisi having been obtained for a mandamus to the Company to pay the costs of the two inquiries and of the title—

H. Hill now shewed cause.—There are several answers to this application. 1. There has been no sufficient demand and refusal of payment. 2. The amount of the costs of the inquiries has not been ascertained in the manner required by the stat. 6 & 7 Will. 4, c. cxxiii, which is a necessary preliminary to the demand of them. Sect. 27 provides that the costs of the inquiry before the sheriff shall be settled and determined by the sheriff, and ss. 37 and 38 contain provisions as to the costs of making out titles, which are to be taxed by the Court of Exchequer. 3. But, besides this, the provisions as to the payment of costs by the Company apply only to cases where land is wanted for the Company under sect. 27; and sect. 37 shews that the costs of title refer to the lands in sect. 27, not where the owner puts them in motion. Under the special provisions of the acts he is not within the protection of sects. 27 and 37. *Corregal v. The London and Blackwall Railway Company* (b) is an express decision to this effect, on this very statute. And, at all events, the owner is not entitled to the costs of the first inquisition, which was

(a) See note (a), p. 119.

Dowl., N. S., 851.

(b) Antè, Vol. 3, p. 411; 2

abortive by reason of the ruling of the sheriff who presided (a). 4. *Regina v. The Hull and Selby Railway Company* (b) shews, that, where there is another remedy, as where an action will lie, a mandamus is not the proper course. Here, a specific remedy is given, as to the costs of the inquisition under sect. 27, by distress, and as to the costs of title, under sect. 38, by an order of the Court of Exchequer.

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Jervis and James, contra.—It is admitted, that the rule cannot be absolute for the costs of the first inquiry. As to the costs of the second, no doubt the case of *Corregal v. The London and Blackwall Railway Company* (c) appears to apply to this question; but it is submitted that that was not a proper construction of the statute. If it is, it presents a most extraordinary state of things, that, an act giving power to the owners of a house to compel the Company to take it, he cannot have his costs of the inquiry unless they should themselves wish to take it. But the words “for the same or a greater sum than shall have been previously offered by the Company” could never have been intended to override the whole section; they must relate only to the purchase of lands taken by the Company, and not to the words following the alternative “or,” viz., “as compensation for any damage or loss which may happen or arise in the execution of any of the powers hereby granted.” The 22nd section, which first constitutes the proceeding by means of a jury, contemplates two things: 1. The case where agreement for compensation for any damage cannot be made; 2. When it cannot be made for the purchase of lands required for the purposes of the act. That gives a remedy, by jury, for two classes

(a) See *Regina v. The London and Blackwall Railway Company*, antè, Vol. 3, p. 409, n.

N. S., Q. B., 257.

(c) Antè, Vol. 3, p. 411; 2 Dowl., N. S., 851.

(b) Antè, Vol. 3; 13 Law Journ.,

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of persons: 1. The landowners, whose land is actually touched and taken; 2. Those whose land is injuriously affected, but not touched; and then sect. 27 gives both classes their remedy for costs. [*Patteson*, J.—The 27th section, in terms, does not seem to apply to a case where the Company have not offered any thing, as here.] That is the fair construction of the clause; it does substantial justice to all parties, and was clearly the intention of the legislature. Sect. 51 was introduced for the purpose of removing any doubt as to property in this locality. The demand and refusal were general, and therefore sufficient for this application. The objection as to the costs not being ascertained, if intended to be relied upon, should have been made when they were demanded. But the provisions in sect. 27, as to their being ascertained by the sheriff, and in sect. 38, as to taxation by the Court of Exchequer, relate only to cases where no question of liability is raised. The applicant comes here to compel them to enable him to have them adjusted, which he cannot effect otherwise. Sect. 37 is general, and applies to all cases of actual and consequential damage.

PATTESON, J.—The case in the Court of Common Pleas, of *Corregal v. The London and Blackwall Railway Company* (a), is a very strong authority, but there is another point in this case which weighs very much on my mind, as to the provision of the 6 & 7 Will. 4, c. cxxiii, s. 27, with respect to the taxation of the costs by the sheriff. Why should not he tax them *ex parte*? It seems to me that a party cannot come to this Court for a mandamus without having first applied to the sheriff to ascertain the amount of the costs in the manner prescribed by the act. It is true, there is no affidavit to shew that the Company made this objection on the application for payment, but Mr.

(a) *Antè*, Vol. 3, p. 411; 2 Dowl. N. S. 851.

Hill has now taken that objection, that you cannot come for a mandamus until the costs have been so ascertained, and I think it must prevail. Even supposing the remedy by distress was out of the question, it seems to me that the proper course, before applying for the interference of this Court, is to go before the sheriff, to get him to ascertain the amount of the costs, then to make a demand on the Company; and, if refused, to proceed by distress.

There is also this difficulty. Suppose I did grant a peremptory mandamus, directing the payment of these costs, who is to ascertain the amount? Not the officer of this Court; for the act says, (sect. 38), that, if the Company and the party from whom the lands are purchased, cannot agree as to the amount of the expenses of the title, the same shall be ascertained by the Court of Exchequer, who, on petition for that purpose, shall refer it to one of the Masters of that Court to tax the costs in the usual manner. If, after the costs were ascertained, you could not levy by distress, or otherwise, perhaps a mandamus might be granted to assist you, but the neglect to ascertain them is a preliminary objection, which cannot be got over; and, therefore, this application is premature. As, however, this question, as to costs, is a novel one, this Court having had exceeding difficulty in interpreting this act on the former occasion, I think this rule should be discharged, but without costs.

Rule discharged, without costs.

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1846.

THE COURT OF EXCHEQUER.

*In Hilary Term, 1846.**Jan. 24th.*HIGGINS *v.* EDE and Another.

In an action by an engineer against the provisional committee of a Railway Company, for surveying a line of railway and branches, and supplying books of reference, it is not necessary that he should state in his particulars of demand the charge per mile of the survey, nor the number or contents of the books of reference.

ASSUMPSIT for 3774*l.* 4*s.* for work and labour, materials, and on an account stated. The following were particulars of the plaintiff's demand.

“ This action is brought to recover the amount of following items of account:—

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£

<i>June</i> . . .	A preliminary survey of the Derby, Uttoxeter, and Stafford Railway, including the examination of the country, taking trial sections, attending public meetings at Uttoxeter, attending committees and other meetings, tavern and travelling expenses	343
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<i>Nov. 4</i> . . .	The survey of 36½ miles	1460
	The survey of the Burton branch; also the alternative line B. from Finden; also the alternative line C. to Baswick; also the alternative line D. to the Grand Junction Railway, 10½ miles in all	630

<i>Nov. 7 to 30.</i>	Time and expenses of surveyors, and assisting the solicitor with books of reference, both in the country and in London	320
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Carried forward £2753

	£	s.	d.
<i>Brought forward</i>	2753	0	0
Engraving 33 plates of plans .	825	0	0
Paid for copperplates . . .	129	0	0
Printer's account . . .	67	4	0
	<hr/>		
	£3774	4	0

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"Above are the particulars of the plaintiff's demand,"
 &c.

The defendants took out a summons at chambers for further and better particulars, but *Alderson*, B., having refused to make the order,—

James now applied to the Court for that purpose.—(He moved on an affidavit of the defendant's attorney, who stated that the action was brought by the plaintiff, an engineer, against the defendants as members of the provisional committee of the Derby, Uttoxeter, and Stafford Railway Company, that, without further and better particulars, they could not proceed in their defence, nor determine what amount to pay into Court; and that he, the attorney, never saw any of the work done, or any of the books of reference). It is not stated how much time was occupied in the survey, how many persons employed in it, nor how much per mile is charged for it. All these things ought to be distinctly specified, so that the defendants may test the propriety of the charges, by examining other engineers. As to the books of reference, it is not stated how many there were, when they were delivered, nor what were the contents of them.

POLLOCK, C. B.—This rule must be refused. The plaintiff charges in gross for his professional services as an engineer, including many particular items. It is contended that he ought to have been more specific in his particulars, or, at all events, should have shewn how much per

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mile he charged for his survey. But that might be exceedingly difficult, as the trouble and expense might be greater in some miles than in others. It is like the case of goods sold, where it is sufficient to state generally that the action is brought for goods sold. As to the books of reference, the standing orders of Parliament require that a copy of so much of the plans and sections as relates to each parish in or through which the work is intended to be made, with a book of reference thereto, shall be deposited with the parish clerks, for the purpose of inspection; and that the defendants, who are members of the provisional committee, must know perfectly well, and have ample opportunity of ascertaining their contents. If not, and they can satisfy a Judge at chambers of that fact, they may perhaps get better particulars there.

PARKE, B.—All that is necessary to be known is the general nature of the demand, so as to see what the plaintiff seeks to recover. Here he states that his claim is for a survey over a certain number of miles of railway, and certain branches, which are specified. As to the books of reference, if they were supplied to the defendants, *primâ facie* they must be taken to know both the number and contents of them.

PLATT, B., concurred.

Rule refused (a).

(a) See the next case.

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RENNIE and Another v. BERESFORD and Others.

Jan. 27th.

THIS was an action brought by the plaintiffs, engineers and surveyors, against four of the provisional committee of the Leeds and Carlisle Railway Company, for work and labour, money paid, &c. The particulars of demand were as follows:—

“This action is brought to recover the sum of £6855, the balance of the undermentioned account delivered in the month of December last, with interest, &c.

“Leeds and Carlisle Railway Company.

To Messrs. Rennie.

1845.

Between 18th September and 30th November.

To preliminary survey and examination of the country between Leeds and Carlisle, in order to determine the best line, including travelling charges and assistance

£ s. d.

250 0 0

Between 27th September and 30th November.

To personally examining the country between Leeds and Carlisle, making sundry trial sections, laying out the main line; finding surveyors, levellers, and engineers, superintending the same; meeting the solicitors, arranging with them, and assisting at the reference; taking all the cross sections of the roads, and making the proposed alterations therein; getting out the finished plans and sections, furnishing the solicitors with tracings to take their reference, meeting solicitors, and putting numbers on the plans to correspond with the reference; laying out all the gradients and

Carried forward £250 0 0

In an action by an engineer for surveying a line of railway, the Court will not compel him to give minute particulars of the items of his demand; it is sufficient if he gives such reasonable information as shall enable the defendant to ascertain how much he should pay into Court, or resist at the trial.

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	<i>Brought forward</i>	£	s.
		250	0
curves on the plans and sections, superintending the engravings, and furnishing the engraver from time to time with the requisite plans and sections, correcting the proofs; sundry meetings with the chairman of the committee of selves and assistants; and generally directing and superintending all the different departments of surveying, levelling, engineering, and inquiring, &c., including tavern bills, travelling charges, and office expenses . . .		8980	C
To laying out, surveying, and levelling between Bramholt Tunnel, on the Leeds and Thirsk Railway, passing by Otley towards Bolton, according to the original intention of the committee, 10 miles, at £55 . . .		550	0
To surveying, levelling, and laying out, and alteration in the line near Bolton, to avoid the opposition of the Duke of Devonshire, four miles, at £55		220	0
To surveying, levelling, and laying out a deviation of the line between Kettlewick and Thwaites' Bridge, in order to adopt the atmospheric principle, by order of the board, 16 miles, at £55		880	0
To ditto, ditto, another deviation, to avoid the second tunnel at Bainbridge, including all the necessary documents fit for deposit, furnishing solicitors and engravers with plans, &c., completed in the same manner as the main line, 6 miles, at £105		630	0
To Mr. Arrowsmith, the engraver's bill . . .		1345	0
		<hr/>	
		12,855	0
By cash on account, at various times		6,000	0
		<hr/>	
		£6,855	0

Interest on £6855, from the 10th of January, 1844, at £5 per cent. per annum, until payment.

"Above are the particulars of the plaintiff's demand,"
&c.

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On an application at chambers, *Alderson*, B., made an order only that better particulars of money paid by the plaintiffs to the use of the defendants should be given. In the further particulars the plaintiffs stated only the sums paid to the workmen, and not the amount of the different tavern bills. The defendants being dissatisfied with the limited order made, and with the way in which it was complied with—

M. Smith now moved on affidavit for a rule calling on the plaintiffs to furnish further and better particulars of their demand, and for a stay of proceedings in the mean time.

1. There is no reason why an engineer or surveyor should be exempted from furnishing as full information to the defendants as any other person would be compelled to give. [*Alderson*, B.—That must depend on the manner of keeping accounts in the particular business. You cannot expect a surveyor to tell the number and extent of the fields he has surveyed, or how many times he has used the theodolite.] Here there is one item for the gross sum of £8980, for personally examining the country, making level and cross sections, travelling and tavern expenses, surveying, and assistance, all in general terms, without even detailing the number of miles surveyed, of days occupied, the attendants employed, or amounts paid. [*Pollock*, C. B.—Would a bill for surveying so many miles at so much per mile be satisfactory?] No; it should at least appear how much is charged for the personal work of the en-

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gineers themselves, and how much for their assistants, and other charges. The object of requiring particulars of demand is, that the defendants may see what items the plaintiffs intend to claim at the trial, so that, if any part of the claim cannot be resisted, it may be paid into Court. In this case the plaintiffs have it in their power to do what is required; for, in a letter, dated 14th January, 1846, they say, "We do not feel that we should be justified in handing you the accounts you ask for, without a clear understanding with you that you will pay the amount. Messrs. Rennie have shewn to the directors, weeks ago, the extent to which they are out of pocket; they proposed to the directors to pay them that amount, and to leave the claim for service beyond those disbursements, to ulterior discussion." An attorney would be required to furnish the items of his bill. [*Alderson*, B.—That is because his bill is to be taxed, when the propriety of each item would be considered.] Here, if the defendants were to pay the plaintiffs any particular part of the demand, they might be liable to be sued by others for the same, on the ground that credit was given to the Company and not to the plaintiffs.

2. At all events, the order made at Chambers for better particulars has not been complied with, and will now be enforced.

Sir *J. Bayley*, who was to shew cause in the first instance, was not called upon.

POLLOCK, C. B.—I think that the discretion exercised by my Brother *Alderson*, at chambers, was quite correct, and that there should be no rule in this case. If the items of stationery, expenses, &c. in this bill were in themselves the subjects of a charge, there ought to be particulars of them, but not when they are merely inserted as explanatory of a charge already made. We do not propose, in refusing this rule, to lay down any special rule for engineers, but I

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do not think that all the details of their claim are more to be required than in the case of a coachmaker or builder. When a coachmaker sends in his bill for a carriage, he is not obliged to shew in his particulars of demand the different items of which it consists, namely, how much of the charge is for workmen employed, how much for painting, and how much for the wheels. So in the case of a surveyor or engineer. If, in his bill of particulars, he gives such information as would be reasonably sufficient for the purposes of justice, that is, so that the defendant may see how much, if any, he ought to pay into Court, and how much he should oppose at the trial, we will not compel him to go into more minute details of his bill. It is said, that it would not be satisfactory here, if it were stated how much a mile was charged for the survey, but I think it would, as then the only question for the jury would be the reasonableness of the charge. Now, though the defendants here are not told the number of miles charged for, the terminus à quo and terminus ad quem are given, and any other engineer, by taking those points on the map, could easily ascertain the number of miles, and say whether such charge was fair and reasonable or not. We ought not to accede to an application which, if granted, would probably only serve to hamper the plaintiff at the trial. As to the other point, if the Judge's order has not been properly obeyed, the right course is to go before him again at chambers.

ALDERSON, B.—I am entirely of the same opinion. If the order made by me at chambers is not properly complied with, you ought to apply at chambers again; but I do not think that the plaintiffs ought to be called upon to do more than they have done here. A defendant is entitled to have such particulars of the plaintiff's demand as will supply such information as a reasonable man will require

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respecting the claim against which he has to defend himself; that is, to furnish a guide to the defendant, by controlling the general statement of the declaration. To require more would be only to bind the plaintiffs by definite statements, so as to have the effect, by confining them within certain limits, of hampering and trapping them at the trial. Here an engineer is directed to survey certain land for a railway; he delivers an account, generally, for that, and for travelling and tavern expenses; and surely is not to be prevented from proving that by general evidence at the trial, because he has not given chapter and verse for every item. Of course, the defendants were entitled to know the amount of money said to be paid for their use.

ROLFE, B., concurred.

Sir *J. Bayley* then applied for costs, on the ground that the application, if unsuccessful, would have operated as a stay of proceedings, and delayed the plaintiffs from going to trial.

M. Smith, contra, referred to 2 Chitty's Archbold's Practice, 1194, and the cases cited there.

PER CURIAM.—In all those cases the application, if granted, would not have delayed the plaintiff. Here, it would, and, therefore, is an exception to the general rule there laid down.

Rule refused—Costs to be costs in the cause.

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Jan. 26th.

ASSUMPSIT for work done by plaintiff for defendant, and for money lent and paid, and on the account stated. Plea 1. Non-assumpsit. 2. Payment. 3. Set off. 4. That, after the passing of a certain act of Parliament (8 Vict. c. 110, intituled, "An act for the registration, incorporation, and regulation of Joint Stock Companies," and after the 1st day of November, 1844, the plaintiff, for and on behalf of the defendant, bought, sold, and disposed by sale of divers, to wit, 5000 shares of and in the capital stock and funds of certain joint-stock Companies, the formation of which said joint-stock Companies respectively was commenced after the 1st day of November, 1844, to wit, of a certain joint-stock Company called the Churnet Valley Railway Company, &c. (naming eight other railway Companies). And the defendant further saith that the said work, in the said first count mentioned to have been done by the plaintiff for the defendant, was and is work done by the plaintiff in and about and in respect of the buying, selling, and disposing by sale, for and on account of the defendant as aforesaid, of the said shares in the said several joint-stock Companies respectively, and that the said money, in the said third count mentioned to have been paid by the plaintiff for the defendant, was money paid by the plaintiff in and about, &c., and that the said account, in the said last count of the declaration mentioned to have been stated by and between the plaintiff and defendant, was and is an account stated by and between them, of and concerning the said monies in the said first and third counts respectively, and for and on account of no other monies whatsoever. And the defendant further saith, that at the time of the buying, selling, and disposing by sale of the said shares in the said joint-stock Companies respectively

The 7 & 8 Vict. c. 110, s. 26, enacting, "that until a joint-stock Company, formed after the 1st November, 1844, shall have obtained a certificate of complete registration, contracts for the sale of shares therein shall be void, and the persons entering into such contracts liable to a penalty," does not extend to railway companies, which cannot be carried into execution without obtaining the authority of Parliament.

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as aforesaid, the said joint-stock Companies respectively had not, nor had any or either of them, been completely registered, nor had they, or any of them, nor any person for them, or on their behalf, obtained a certificate of complete registration according to the provisions of the said act. Verification.

Replication to fourth plea. That the formation of the said joint-stock Companies in that plea mentioned was not commenced after the 1st of November, 1844, modo et formâ, &c. Demurrer.

Jervis, in support of the demurrer (*a*).—The question is, whether, upon the true construction of the various sections of the 7 & 8 Vict. c. 110 (*b*), the restriction placed

(*a*) Before *Pollock*, C. B., *Al-der-son* and *Platt*, Bs. It was agreed that the argument should be confined to the question of the validity of the plea.

(*b*) The material sections of the act are as follows :—

General Provisions.

Sect. 2 enacts, “ That this act shall apply to every joint-stock Company, as hereinafter defined, established in any part of the united kingdom of Great Britain and Ireland, except Scotland, or established in Scotland and having an office or place of business in any other part of the united kingdom, for any commercial purpose, or for any purpose of profit, or for the purpose of assurance or insurance (except banking Companies, schools, and scientific and literary institutions, and also friendly societies, loan societies, and benefit building socie-

ties, respectively, duly certified and inrolled under the statutes in force respecting such societies, other than such friendly societies as grant assurances on lives to the extent hereinafter specified) : and that the term “ joint-stock Company ” shall comprehend :—every partnership whereof the capital is divided or agreed to be divided into shares, and so as to be transferable without the express consent of all the co-partners ; and, also, every assurance Company or association for the purpose of assurance or insurance on lives, or against any contingency involving the duration of human life, or against the risk of loss or damage by fire, or by storm or other casualty, or against the risk of loss or damage to ships at sea or on voyage, or to their cargoes, or for granting or purchasing annuities on lives ; and also every institution inrolle

by section 26 on the sale of shares in joint-stock Companies formed since the 1st of November, 1844, which, hav-

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under any of the acts of Parliament relating to friendly societies, which institution shall make assurances on lives or against any contingency involving the duration of human life to an extent upon one life or for any one person to an amount exceeding two hundred pounds, whether such companies, societies, or institutions shall be joint-stock Companies or mutual assurance societies, or both; and also, every partnership which at its formation, or by subsequent admission (except any admission subsequent on devolution or other act in law), shall consist of more than twenty-five members: And that, except where the provisions of this act are expressly applied to partnerships existing before the said first day of November, it shall be held to apply only to partnerships the formation of which shall be commenced after that date: Provided nevertheless, that, except as hereinafter specially provided, this act shall not extend to any Company for executing any bridge, road, cut, canal, reservoir, aqueduct, waterwork, navigation, tunnel, archway, railway, pier, port, harbour, ferry, or dock, which cannot be carried into execution without obtaining the authority of Parliament: Provided also, that, except as hereinafter is specially provided, this act shall not extend to any Company incorporated or which may be hereafter incorporated by statute or charter, nor to

any Company authorised or which may be hereafter authorised by statute or letters patent to sue and be sued in the name of some officer or person."

Sect. 3. "And be it declared, that the following words and expressions are intended to have the meanings hereby assigned to them respectively, so far as such meanings are not excluded by the context or by the nature of the subject-matter; that is to say, the word "Company" to mean any joint-stock Company or other institution, as before defined," &c.

Registration of Companies.

Sect. 4 provides for the provisional registration of any Company for any purpose within the meaning of this act, whether for executing any such work as aforesaid under the authority of Parliament or for any other purpose."

Sect. 7 enacts, "That it shall not be lawful for any joint-stock Company hereafter to be formed for any purpose within the meaning of this act, whether for executing any such work as aforesaid under the authority of Parliament or for any other purpose, to act otherwise than provisionally in accordance with this act, until such Company shall have obtained a certificate of complete registration as hereinafter provided; and no joint-stock Company shall be entitled to receive a certificate of complete registra-

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ing been provisionally registered, have not obtained a certificate of complete registration, is to be extended to rail-

tion unless it be formed by some deed or writing under the hands and seals of the shareholders therein" &c., "which deed is to be registered."

Sect. 9 provides, "That, if any Company for executing any bridge, road, cut, canal, reservoir, aqueduct, waterwork, navigation, tunnel, archway, railway, pier, port, harbour, ferry, or dock, which cannot be carried into execution without the authority of Parliament, deposit at the proper offices of the two houses of Parliament, in compliance with the standing orders of such houses respectively, and at or within the time required by such standing orders, such deeds of partnership or subscription contracts as shall be required to be deposited by such standing orders, and also return to the said registry office a copy of such deeds of partnership or subscription contracts, together with such certificate of the receipt of such plans, sections, and books of reference as shall be appointed by the said committee of privy council for trade, then it shall be lawful for the registrar of joint-stock Companies, and he is hereby required, to accept the same instead of the deed of settlement by by this act required to be returned for the purpose of obtaining a certificate of complete registration; and thereupon such Company shall be entitled to a certificate of complete registration accordingly."

Powers and Privileges of Companies.

Sect. 23 enacts, "That, on the provisional registration of any Company being certified by the registrar of joint-stock Companies, it shall be lawful for the promoters of any Company so registered to act provisionally, but not for any longer period than twelve months from the date of the certificate, unless such certificate shall be renewed, which may be done on application for that purpose; and no such renewed certificate shall be in force for a longer period than twelve months from the date thereof; and it shall be lawful for the promoters of such Company,—

"To assume the name of the intended Company, but coupled with the words 'registered provisionally'; and also,

"To open subscription lists; and also,

"To allot shares, and receive deposits by way of earnest thereon, at a rate not exceeding ten shillings for every one hundred pounds on the amount of every share in the capital of the intended Company; and also, in the case of Companies for executing any bridge, road, cut, canal, reservoir, aqueduct, waterwork, navigation, tunnel, archway, railway, pier, port, harbour, ferry, or dock, which cannot be carried into execution without the authority of Parliament, in addition to and exclus-

way and other Companies, which require the authority of Parliament in order to be carried into execution. The

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ive of such sum of ten shillings per hundred pounds, such further sum per hundred pounds on the amount of every such share as may be required by the standing orders of either house of Parliament to be deposited before the obtaining of an act of Parliament for enabling the Company to execute such work ; and also,

“To perform such other acts only as are necessary for constituting the Company, or for obtaining letters patent, or a charter, or an act of Parliament ;

“ But not to make calls, nor to purchase, contract for, or hold lands, nor to enter into contracts for any services, or for the execution of any works, or for the supply of any stores, except such services and stores or other things as are necessarily required for the establishing of the Company, and except any purchase or other contract to be made conditional on the completion of the Company, and to take effect after the certificate of complete registration, act of Parliament, or charter or letters patent shall have been obtained, and, except in the case of Companies for executing such works as aforesaid, contracts for services in making surveys and performing all other acts necessary for obtaining an act of incorporation or other act for enabling the Company to execute such works.”

Section 24 provides for a penalty of £25 against certain pro-

ceedings of Companies before provisional registration.

Section 25, after enacting that, on the complete registration of any joint-stock Company, it shall become incorporated and obtain certain powers and privileges therein specified, provides, “with regard to any Company for executing any bridge, road, cut, canal, reservoir, aqueduct, water-work, navigation, tunnel, archway, railway, pier, port, harbour, ferry, or dock, which cannot be carried into execution without obtaining the authority of Parliament, that, on the complete registration of any such Company, and before such Company shall have obtained its act of incorporation or other act whereby the authority of Parliament shall be granted for executing such work, it shall not be lawful for any such Company, or the directors or officers thereof, to exercise the hereinbefore mentioned power to enter into contracts, otherwise than conditionally upon obtaining such act, or to exercise the power to purchase and hold lands as aforesaid, or to exercise the power to receive instalments from shareholders beyond the sum or percentage necessary to be deposited in compliance with the standing orders of either house of Parliament, or such other sum as may be requisite for obtaining the act of incorporation or other act for granting the authority of Parlia-

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plaintiff will contend that section 2 gives the key to the 26th, and excludes railway Companies from its provisions,

ment to execute such work, or to exercise the power to borrow money, as aforesaid, or to exercise the power to declare dividends, as aforesaid ; and, subject to these last-mentioned exceptions, all the powers by this enactment hereinbefore given to any Company completely registered, except the general power to perform all acts necessary for carrying on the business of the Company, may be exercised as fully by any such Company so completely registered as by any other Company so completely registered : provided always, that it shall be lawful for any such Company to perform all acts which may be necessary for obtaining an act of incorporation or other act for obtaining the authority of Parliament to execute its works as aforesaid, anything herein contained to the contrary notwithstanding ; and that, upon obtaining such act of incorporation or other such act as aforesaid, or at the time of the coming into operation of such act as shall be thereby appointed, all the powers which any such Company shall obtain by virtue of this act, and all the provisions and regulations of this act which shall apply to such Company, shall cease and determine, except so far as shall be otherwise provided by such act of incorporation or other such act as aforesaid."

Section 26 enacts, "That no

shareholder of any joint-stock Company completely registered under this act shall be entitled to receive any dividends or profits, or be entitled to the remedies or powers hereby given to shareholders, until he shall have executed the deed of settlement of the said Company, or some deed referring thereto, and also have paid up all instalments or calls due from him, and shall have been registered in the Registry Office aforesaid ; and further, that it shall be lawful for every shareholder who shall have signed such deed, and paid up such instalments or calls, and shall have been registered, and he is hereby entitled,—

"To be present at all general meetings of the Company ; and also,

"To take part in the discussions thereat ; and also,

"To vote in the determination of any question thereat, and that either in person or by proxy, unless the deed of settlement shall preclude shareholders from voting by proxy ; and also,

"To vote in the choice of directors, and of every auditor to be elected by the shareholders ;

"Subject nevertheless to the provisions of this act, and of the deed of settlement of the Company or other special authority, so far as such provisions shall either regulate or restrict the exercise of such powers, but not so as to deprive such shareholders

as not being specially mentioned in it. But section 26 speaks sufficiently plainly for itself, and, if not, is explained by the 23rd and other sections. The title and preamble of the act shew that it was intended to be equally applicable to all Companies; and the provision in the 2nd section does not require that a railway shall be specially named, but that the specific enactment should apply to it. Then the language of sect. 26 is perfectly plain; it speaks of *any* share in *any* joint-stock Company. [*Alderson*, B. —“Specially provided for” must mean where railways are named]. All the sections, from 23 to 26 inclusive, are comprised under the heading in the margin of the act, “Powers and privileges of Companies.” That is not the mere usual marginal note of a statute, but a division of the act itself, and must be read as part of it. Each of these sections, therefore, equally applies to all descriptions of joint-stock Companies, and “specially provides” for railways, even when it does not specially *name* them. Now, sect. 23 uses exactly the same words, “any Company;” and there, though a railway is not mentioned, it is specifically provided for, for it afterwards enables the promoters

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thereof; and further, with regard to subscribers and every person entitled or claiming to be entitled to any share in any joint-stock Company the formation of which shall be commenced after the first day of November, 1844, that, until such joint-stock Company shall have obtained a certificate of complete registration, and until any such subscriber or person shall have been duly registered as a shareholder in the said Registry Office, it shall not be lawful for such person to dispose, by sale or mortgage, of such share, or of any interest therein, and that every contract

for, or sale or disposal of, such share or interest shall be void, and that every person entering into such contract shall forfeit a sum not exceeding ten pounds; and that, for better protecting purchasers, it shall be the duty of the directors of the Company by whom certificates of shares are issued to state on every such certificate the date of the first complete registration of the Company, as before provided; and that, if any such director or officer knowingly make a false statement in that respect, then he shall be liable to the pains and penalties of a misdemeanour.”

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of *such* Company, in the case of Companies for executing railways, &c., to do certain things. The word “any,” therefore, in sect. 26, has the same meaning as in sect. 28, and includes the same Companies. Then, sect. 24 clearly applies to railways, from the absolute necessity of such a provision. Sect. 25 provides for the complete registration of all Companies; and, unless any limit is put upon that provision by the words of sect. 26, it includes every description of Company, as much as if the words used in the latter section were “*all* Companies,” instead of “*any* Company.” There is nothing to shew that such limit was intended, and the manifest object of the act was to prevent improper speculations in the sale of scrip, and therefore prohibit the sale of shares in any Company only provisionally registered.

Martin (*Corrie* with him), *contrà*.—The sale of shares in a Company for making a railway, or other work which cannot be carried into effect without the authority of Parliament, is not within sect. 26. The only intelligible mode of reading the act is this: enactments are to be made as to joint-stock Companies, but there are some Companies to which it is intended those enactments shall refer only when they are especially named. That is a key to the whole act. It applies to all Companies other than those excepted by sect. 2, and which may be carried out without the intervention of Parliament. [*Alderson*, B.—The act is general. There is a total exception of railways, but in that total exception there is another exception,—that is, where they are specially named; then you look into the particular clause, to see whether they are there or not.] Sect. 4, which uses words quite as general as sect. 26, specially adds them; and so does sect. 7, where, otherwise, it would have been quite sufficient to speak of Companies already provisionally registered. Then, sect. 9 enables them to be completely registered, but only if they think proper; it is

not necessary when an act is obtained; and sect. 14 carries out that view by providing for Companies, *except* those which shall have been incorporated by an act of Parliament after complete registration. Sect. 25 points out the privileges conferred by complete registration. The effect is, to make the Company a corporation for carrying out its objects, clothed with all the qualities of a corporation, except that the individual members of it are liable, as in an ordinary partnership. It refers, first, to the final completion of the body, without reference to Parliament at all, and was never intended necessarily to have any thing to do with Companies to be completed by an act. Then, the latter part of the section contains a proviso restricting the powers of Companies for executing parliamentary works before obtaining an act: and if that proviso is read as a separate enactment, the code is perfect. [*Alderson*, B.—Sects. 25 and 26 do not seem to apply to the same Companies. Sect. 25 says, that, on a Company obtaining their act, all the provisions of this act shall cease; and then sect. 26, that, until complete registration, no subscriber shall sell his shares,—that is, shall be under the provisions of this act,—which is inconsistent.] The same view is carried out in every portion of the act. The words “joint-stock Company” simply mean Companies other than those which require the authority of Parliament. Sect. 26 clearly does not apply to the latter, as it first restricts the powers of declaring dividends till after the execution of the deed of settlement, whereas, by sect. 25, railway Companies are prohibited from declaring dividends at all till the obtaining of their act.

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Jervis, in reply.

POLLOCK, C. B.—This was an action for work and labour, under the common counts, to which the defendant pleaded that the work in question was done after the pass-

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ing of the 7 & 8 Vict. c. 110, in the sale and disposal of shares in certain joint-stock Companies, formed since the 1st of November, 1844, and which, at the time the work was done, were not completely registered in the manner prescribed by that statute. The replication denies the matters stated in the plea as to the time when the Companies in question were formed. But the question for our consideration is, whether or not the plea is good. It was contended, on the part of the plaintiff, that, comparing the 2nd section of the act with the 26th, the latter, which renders such contracts illegal, and subjects the parties concerned in them to a penalty, according to the strict rules of legal construction does not apply to the case of joint-stock Companies which have for their object the making of a railway, and cannot be carried into effect without the authority of Parliament, and therefore were not intended to be completely registered, though it is optional to them so to be. It is further contended that that is not only the legal construction of the act, but really was the intention of the legislature when it was passed ; and I think both these propositions are satisfactorily made out.

I am of opinion, that, upon the true construction of the 26th section of this act of Parliament, the case of the sale of shares in a Railway Company, under the circumstances stated, is not within the operation of that section. Sect. 2 provides (and such a provision amounts to an express enactment) that the act shall not, "except as hereinafter is specially provided," extend to any Company for executing any *railway* (inter alia) which cannot be carried into execution without obtaining the authority of Parliament. The act, therefore, does not extend to any Company created for those purposes at all, except as hereinafter is specially provided for them. Now, the 26th section, under which the plea is framed, contains no special provision with reference to a Company for executing a railway ; and as we must take it on these pleadings that the Companies, in respect of the

sale and transfer of shares in which this action is brought, do require the authority of an act of Parliament to carry them into effect, it follows that they are not within the 26th section. If it had been intended to shew that these railways were not of the particular species which require the authority of Parliament to carry them into effect, it should have appeared by the plea. The act speaks generally of Companies formed for the purpose of executing railways, and we must take it that the proposed Railway Companies mentioned in the plea were such as required the authority of Parliament. Then sect. 2 expressly excepting Railway Companies from the operation of the act, unless particularly referred to, sect. 26 renders contracts in shares in joint-stock Companies not completely registered void, and exposes every person entering into such contract to a penalty, in these words: "And further, with regard to subscribers, and every person entitled, or claiming to be entitled, to any share in any joint-stock Company, the formation of which shall be commenced after the 1st November, 1844, that, until such joint-stock Company shall have obtained a certificate of complete registration, and until any such subscriber or person shall have been duly registered as a shareholder in the said registry office, it shall not be lawful to dispose, by sale or mortgage, of such share, or of any interest therein." Then the question is, whether, notwithstanding that there is no special provision extending that clause to a Railway Company, we are to extend it by implication. I think we are not; and that, even if the intention of the Legislature were doubtful, comparing these two sections together, and looking to the legal effect of their language, we could not hold, in this case, the parties dealing in these shares liable to penalties, except upon the clearest grounds. But it is very satisfactory to discover, from the other sections of the act, good and sufficient reason for arriving at the intention of the act; so that, while we are bound to give effect to the intention of the

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Legislature, instead of attempting to reconcile doubts, we can see such intention so plainly, that we can give such an interpretation to the language as shall give effect to the intention; and I think the meaning of the Legislature was in accordance with the legal effect of the language, namely, to control the 26th section in the 2nd. Mr. *Jervis* contended, that a certificate of complete registration was necessary in the case of Railway Companies, as well as of other joint-stock Companies, which are clearly within the statute. And if it should turn out that the provision in the statute, which requires the complete registration of a Company, does not apply to the Companies before us, it would be a strong argument to shew they were not intended to be included in the 26th section; for if it was intended that the provision, that, until complete registration, shares shall not be disposed of, and contracts for them shall be void, should apply to such Railway Companies as these, they would, of course, be bound both to register provisionally in the first instance, and afterwards obtain a certificate of complete registration. Now, it appears to me clear, that it is not necessary for them to be completely registered. Sect. 23 empowers them to obtain a certificate of provisional registration, which is to endure for twelve months, during which time they may assume the name of the intended Company, open subscription lists, allot shares, and receive deposits, both by way of earnest on the shares, and to enable them to comply with the standing orders of Parliament, and may perform such other acts only as are necessary for constituting the Company, or for obtaining letters-patent, or a charter, or an act of Parliament; leaving it, as it appears to me, open to the promoters to constitute themselves a Company for particular purposes by complete registration, without an act of Parliament. And what their rights and powers would be with such complete registration is shewn by sect. 25. But that section also shews that they may, by being provisionally registered and obtaining an act, execute

these without complete registration at all; for it provides, that, on obtaining an act of Parliament, all powers which any Company shall have obtained under the 7 & 8 Vict. c. 110, that is, in every respect, either by provisional or complete registration, shall cease and determine, except so far as shall be otherwise provided for by their own act. It seems to me, therefore, that the 25th section expressly exempts parliamentary joint-stock Companies from every operation of this act as soon as a Company has obtained a certificate of complete registration and an act; and if they obtain an act before complete registration, then that step is unnecessary, and the 7 & 8 Vict. c. 110, is equally excluded. The plea, therefore, is bad, as disclosing no defence to the action.

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ALDERSON, B.—I am entirely of the same opinion, and think these Companies are not within the 26th section of the 7 & 8 Vict. c. 110. That section enacts, that, until such (that is, any) joint-stock Company shall have obtained a certificate of complete registration, &c., contracts for the sale and disposal of shares in it shall be void, and the parties contracting liable to a penalty. Then we must see what is the meaning of the term “joint-stock Company” in that section. *Primâ facie*, it refers to every sort of joint-stock Company intended to be provided for in the act, including Railway Companies. Then we must turn to the interpretation clause, sect. 2, where all the difficulty lies, to see what the term “joint-stock Company” was intended by the Legislature to mean. It is said to comprehend partnerships, of which the capital is divided, or agreed to be divided into shares, and so as to be transferable without the express consent of all the co-partners, assurance Companies for lives or contingencies on human life, risk of damage by fire, storm, and sea, or for granting annuities. It then includes every partnership of an ordinary description consisting of more than twenty-five members, and

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formed after the 1st of November, 1844. Those are the joint-stock Companies to which, according to the interpretation clause, *primâ facie*, the act applies. But then, it contains a proviso, that, except as hereinafter specially provided, it shall not extend to any Company for executing any railway (*inter alia*) which cannot be carried into execution without obtaining the authority of Parliament. Then we have got thus far. Joint-stock Company means all such Companies before described in this section, but not such as are for the purpose of making a railway, and which require the authority of Parliament for their execution. But upon this provision there is an exception, that the act shall not extend to such Companies “except as hereinafter is specially provided;” so that the clause must be read as applicable to all joint-stock Companies, except railways and others which require the assistance of Parliament, and to them when specially provided. That seems to be the meaning of the interpretation clause, which is the greatest difficulty in the case. Then, how are we to read the term “joint-stock Company” in the 26th section. There is no special provision in it to bring Railway Companies within its operation; so that it follows that they are not within that section. Then, is there anything in the rest of the act inconsistent with this view? I think not. On looking at the other clauses, I should conjecture that it was the intention of the Legislature to provide for all Companies, including railways, up to the 25th section; when having disposed of railways by the obtaining of their act of Parliament, it leaves them, and proceeds afterwards to provide for the transfer of shares in joint-stock Companies of other descriptions; for I can find no allusion in any section afterwards to a railway or other Company excepted out of the interpretation clause.

It appears to me, therefore, upon the best construction I can give it, that the object of the Legislature, down to the 25th section, was to make general provisions for all Com-

panies, and after that, special provisions for Companies not specially provided for before ;—that the 26th section, therefore, does not apply to Railway Companies which, having been provisionally registered, go before Parliament and obtain acts of their own, by which alone they are to be regulated and governed. The plea, therefore, is bad, this not being such a trafficking in shares as would be illegal under this statute.

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PLATT, B.—I am of the same opinion. The 26th section being penal, requires a strict construction ; and it is clear to me that the Legislature only intended the joint-stock Companies referred to in it to apply to Companies which *require* complete registration, which I entirely agree is not the case with Railway Companies generally speaking. Sect. 23 empowers Companies provisionally registered to act under it for twelve months, with a view, apparently, of giving them an opportunity during that time of applying to Parliament. I agree as to the construction put upon the 2nd section, that the words “ except as hereinafter specially provided ” apply only to those cases where there is a special provision, and there is none in sect. 26. Where we find a special provision in the act, we must apply the law ; where we do not, the law is not applicable. In sect. 3, the word “ Company ” is said to mean any joint-stock Company or other institution “ as before defined.” It includes, therefore, all Companies except railways, unless when they are specially provided for. I think it is clear that the 26th section does not apply to any Companies which require an act of Parliament to enable them to begin their works. I am of opinion, therefore, that the plea is bad.

Judgment for the plaintiff.

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*In Hilary Vacation, 1846.**Feb. 10th.*

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The Joint Stock Companies Act, 7 & 8 Vict. c. 110, s. 2, enacts, that, except where the provisions of that act are expressly applied to partnerships existing before the 1st of November, 1844, it shall be held to apply only to partnerships the formation of which shall be commenced after that date.

A Railway Company was incorporated by an act, (7 & 8 Vict. c. lix), before the 1st of November, 1844. Subsequently to that day, the Company resolved to make an extension line, and, on the 30th of July, 1845, obtained an act for that purpose, 8 & 9 Vict. c. xxxviii.

Held, that the latter undertaking was

not a partnership the formation of which was commenced after the 1st of November, 1844, within the meaning of the 7 & 8 Vict. c. 110, s. 2.

In an action on a contract for not delivering railway shares, the measure of damages is the difference between the price of the shares at the time of the contract and the day on which it is broken, allowing the purchaser a reasonable time, however, to purchase other shares.

ASSUMPSIT.—The declaration stated, that, on the 3rd of February, 1845, by a certain agreement then made between the plaintiff and the defendant, the plaintiff, at the request of the defendant, bargained and agreed to buy of the defendant, and the defendant then bargained and agreed to sell to the plaintiff, a certain interest of him the defendant in a certain Company, or partnership undertaking, for constructing a certain railway in the county of York, called the New Bradford Railway, at a certain price in that behalf, to wit, 14*l.* 12*s.* 6*d.* for each and every share, (including in such price the sum of 2*s.* 6*d.* per share, to be paid for commission to certain persons carrying on business as sharebrokers, under the style or firm of Messrs. Moore and Gatliff, by whom the said agreement was made as such sharebrokers as aforesaid, for and on behalf of the said defendant), and which said price was to be paid on or before the 30th of March, 1845; and thereupon, to wit, on the day and year first aforesaid, in consideration thereof, and that the plaintiff, at the request of the defendant, then promised the defendant to accept, and receive, and pay for, at the rate or price aforesaid, within the said time mentioned in the said agreement, the said interest or shares, the defendant then promised the plaintiff, when requested so to do by the plaintiff within the said period, to deliver to the plaintiff the said shares, and certain certificates or

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writings, called scrip certificates, for the same. That, although the said time so appointed as aforesaid for the delivery of the said shares so agreed to be bargained and sold as aforesaid had elapsed before the commencement of the suit, and although the plaintiff has always, from the time of the making of the said agreement, hitherto performed and fulfilled all things in the said agreement on his part to be performed and fulfilled, and hath been ready and willing to accept and receive the said shares so agreed to be bargained and sold as aforesaid, and to pay for the same according to the terms of the said agreement; and although the defendant, before and at the said time appointed as aforesaid for the payment of the price of the said shares so agreed to be bargained and sold as aforesaid, had notice of the said several premises hereinbefore mentioned, and within the said time so appointed as aforesaid, to wit, on the 30th day of March, 1845, was requested by the plaintiff to deliver to him the said shares so agreed to be bargained and sold as aforesaid, and the said scrip certificates for the same; and although the plaintiff was, at the said time of making such last-mentioned request, ready and willing to pay for the same at the rate or price aforesaid, whereof the defendant then had notice; yet the defendant hath disregarded his promise, and did not nor would deliver, when so requested as aforesaid, and hath not delivered to the plaintiff any of the said shares so agreed to be bargained and sold as aforesaid, nor delivered to the plaintiff the said certificates for the said shares so agreed to be bargained and sold as aforesaid, but therein hath wholly failed, &c., and on &c. refused to deliver the same &c., and the plaintiff hath lost &c., which might &c., from the delivery by the defendant of the said shares so agreed to be bargained and sold as aforesaid, according to his said promise; to the damage, &c.

Pleas:—1. Non assumpsit. 2. Traverse of request. 3. That the said Company or partnership undertaking in the declaration mentioned was, before and at the time of the

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making of the said contract in the declaration mentioned and from thence hitherto, a joint-stock Company within the meaning of, and answering to the definition in the behalf given in and by a certain statute passed in the eighth year of the reign of her present Majesty Queen Victoria, intituled "An Act for the registration, incorporation, and regulation of joint-stock Companies" (a) and that the formation of the said Company was commenced after the 1st day of November, 1844, to wit, on the 9th of November, 1844. And the defendant says, that the said contract in the declaration mentioned was and is a contract for the sale by the defendant to the plaintiff of certain shares in the said Company, to which said shares he the said defendant, at the time of the making of the said contract, claimed to be entitled. And the defendant further says, that the said Company had not, before or at the time of the making of the said contract, obtained certificate of complete registration, according to the provisions of the said statute in that behalf made. Verification.

The fourth plea was similar to the third, except that instead of stating that the Company had not obtained certificate of complete registration, &c., it alleged that "the defendant had not, before or at the time of the making of the said contract, been duly registered as a shareholder of the said Company in the Registry Office by the said statute provided for the registration of joint-stock Companies, according to the provision of the said statute in that behalf made," &c. Issue was taken, by replying *de injuriâ* to each of those pleas.

The cause was tried before *Rolfe*, B., at the York Summer Assizes, 24th July, 1845, and the jury returned a verdict for the plaintiff on the first and second issues, and for the defendant, by the direction of the Judge, on the third and fourth issues, with an assessment of the damages.

(a) *Antè*, p. 136.

675*l.*, subject to the opinion of this Court as to the finding on the third and fourth issues, and as to the amount of damages.

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In Michaelmas Term a rule was obtained, calling on the defendant to shew cause why the verdict found for him on those issues should not be set aside and entered for the plaintiff, unless the parties should agree to a special case being stated for the opinion of this Court.

A case was agreed upon; which, after stating the above facts and pleadings, proceeded as follows:—

The following was the note or contract made by the broker:—

“ 3rd February, 1845.

“Sold to Mr. Joseph Shaw, on account, fifty shares in the New Bradford Railway; to be paid on or before the 30th March, at 14*l.* 12*s.* 6*d.* per share net.”

The shares in question were scrip for shares in a projected line of railway from Shipley and Colne, called “The Leeds and Bradford Extension Railway,” and were issued by the parties under the circumstances hereinafter stated. The Leeds and Bradford Railway Company is constituted by the stat. 7 & 8 Vict. c. lix, and thereby authorized to make a railway from Leeds to Bradford. On the 15th day of July, 1844, at a meeting of the directors of that Company, it was resolved that an advertisement should be inserted in the papers, stating that the engineer had been instructed to make a survey from Keighley to Shipton, and that Mr. Martin should be engaged to survey the line from Shipton to Keighley. An advertisement was inserted in the newspapers, in compliance with this resolution. At a meeting of the directors of that Company, held on the 12th August, 1844, a deputation of persons interested in the extension line waited upon the directors, when the directors of that Company resolved that an account of the traffic should be taken between Shipley and Shipton, and

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Mr. Murgatroyd undertook to engage some person for that purpose. It was also resolved that Mr. Martin's tender should be accepted for surveying the line from Shipley to Shipton. At a meeting holden on the 26th August, 1844, a deputation from the town of Haworth attended, who expressed a wish that a branch railway should be made from Haworth, to join this line at Keighley, when they were informed that this Company would propose to obtain power, in the next session of Parliament, to make it. At a general meeting of the Company, held on the 28th August, 1844, the directors presented a report to the meeting, from which the following passage has reference to the proposed line:—

“ The directors pledged the Company, when in committee, to extend the line from Shipley to Keighley; and further consideration has induced them to decide on going forward to Shipton and Haworth. These extensions cannot fail to be remunerative to the Company, as well as advantageous to the districts through which they pass; and it is hoped they will facilitate a junction with the Lancashire railways. Some other railways are under consideration, particularly to Halifax, and down the Cleckheaton Valley, and will be brought before the shareholders at a future opportunity.”

At a meeting of the directors, held on the 9th September, 1844, Messrs. Martin and Fox attended with plans and sections of the extension line from Shipley to Shipton and Haworth; and it was resolved that a cheque for £200 be paid to them on account. At a meeting of the directors, held on the 4th November, 1844, it was resolved that a special general meeting should be called on Wednesday, 20th November then instant, for the purpose of considering the expediency of, and, if thought fit, of sanctioning an application to Parliament in the ensuing session for an act for enabling the said Company to make a railway from Shipley, in the West Riding of the county of York, to Colne, in the county palatine of Lancaster, with a branch from Keighley to Haworth, in the said West Riding; and

also for the purpose of considering in what manner the necessary capital for the construction of the said proposed line and branch should be raised. A special general meeting of the Company was held on the 20th November, 1844, in pursuance of the above resolution, at which the following resolutions were come to :—

First, that it is expedient that this Company should undertake the formation of an extension line of railway from the Leeds and Bradford Railway, at Shipley, to Colne, with a branch to Haworth: that the directors of the Company be and they are hereby authorised to take all proceedings that they may consider desirable with a view of applying to Parliament in the next session for an act, authorising the construction of the above railways, or any part of them.

Secondly, that, in order to raise funds for the purposes aforesaid, an additional capital of £500,000 be raised, by the creation of 8000 shares of £50 each, and 8000 shares of 12*l.* 10*s.* each; and that such shares be offered in the first place to the proprietors who shall be registered in the books of the Company on 30th November instant, in the proportion of one £50 share and one 12*l.* 10*s.* share for every £50 share, and that a deposit of £5 per cent. be paid thereon, &c., on or before the 21st of December then next.

On the 6th November the Leeds and Bradford Company advertised in the Leeds Intelligencer and Mercury notice of the intended application to Parliament for an act to make a railway from Shipley to Colne, with a branch to Keighley. And on the 16th November they advertised in the same papers notice of the intended application to Parliament for an act to extend it by a branch from Keighley to Haworth. The shares mentioned in the above resolutions were accordingly issued, and were all offered to and allotted to shareholders in the Leeds and Bradford Railway Company, and came out at a premium. There were shareholders in the extension line, when the act authorising it was passed, not shareholders in the original line of the Leeds

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and Bradford. The contract in the present case was for the sale of fifty shares in the proposed extension line. There was no provisional registration of the Company for making the extension line. A parliamentary contract dated and signed on 2nd January, 1845, was entered into as required by the standing orders of Parliament, a copy of which, signed by the attorneys on both sides, may be referred to, and made a part of this case. Keighley is on the line of the railway from Bradford to Colne, for which application was made to Parliament, in pursuance of the above resolutions, and for which an act was obtained which received the royal assent on the 30th June, 1845. The Leeds and Bradford Company obtained their act for their line on the 14th July, 1844. No certificate of complete registration had been obtained by any Company or persons for making the said railway at the time of making the contract in question in this cause, nor had the defendant been registered as a shareholder in any Company for the shares in question. The foregoing are the agreed facts in the cause.

A question also arises as to the amount of damages. The jury assessed the damages at £675, but leave was reserved to move to reduce them to £450. It was proved that, on the 30th March, 1845, the price was such as to make a difference upon the fifty shares amounting to £675. On the 3rd March, it was such as to make a difference on the fifty shares amounting to £450. On the 3rd March, 1845, the plaintiff caused the following letter to be written the defendant's broker :—

“ Huddersfield, March 3rd, 1845.

“ Gentlemen,—I beg to give you notice that I am prepared to take up the fifty new Bradfords I purchased of you on the 3rd February last; and if those scrips are not delivered to me on or before the 10th instant, I shall buy them in against you, and debit you with the difference. Yours respectfully,

“ JOSEPH SHAW.”

The learned Judge told the jury that he did not consider the damages limited by the prices within the time specified by that letter, and that the question of damages was for them; and that they were, as near as they could, to place the plaintiff in the position he would have been in if the defendant had performed his contract. They returned a verdict for £675. The verdict is to be reduced to £450, if the Court is of opinion that that sum is, in point of law, the proper measure of damages, and that the learned Judge ought so to have directed the jury (a).

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Cleasby, for the plaintiff.—1. The first question, on which the rule was granted, was, whether, as alleged in the 3rd and 4th pleas, this Company is a joint-stock Company, within the meaning of the 7 & 8 Vict. c. 110; for, if it existed before the 1st of November, 1844, it would not be

(a) The material parts of the statutes are as follows:—By the 7 & 8 Vict. c. lix, the Leeds and Bradford Railway Company is incorporated.

The 8 & 9 Vict. c. xxxviii, is intitled “An Act to enable the Leeds and Bradford Railway Company to make a branch from Shipley to Colne, with a branch to Haworth.”

Sect. 3 enacts, “that it shall be lawful *for the said Company* to raise, by creating new shares, in addition to the sums of money which they are authorized to raise by virtue of the said recited act, any further sum of money, not exceeding in the whole the sum of £500,000.

Sect. 4 enacts, “that the capital so to be raised by the creation of new shares shall be considered as part of the general capital of the Company, and shall be subject to

the same provisions, in all respects, whether with reference to the payment of calls, or the forfeiture of shares on non-payment of calls, or otherwise, as if it had been part of the original capital, except as to the nominal amount or value of such shares, and the proportionate dividends thereon respectively, and except also as to any special advantages in favour of, or other regulations in relation to such shares, which may be resolved on by any general or special general meeting of the said Company, and except as to the amount and time of making and of payment of calls on such new shares, which the directors of the said Company shall fix from time to time, as they shall think fit.”

Sect. 5 provides, that, if the old shares are at a premium, the new shares are to be offered to the original shareholders.

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affected by that act, and a contract for the sale of shares would not be illegal under sect. 26. That question, however, now becomes immaterial, as it appears by the declaration that this is a Railway Company, which this Court held to be exempt from the operation of that section *Young v. Smith (a)*.

2. But this cannot be considered a Company formed since the 1st of November, 1844. The shares and shareholders in the Shipley and Colne Railway are not shares and shareholders in a new line, but in an extended line to be constructed by the Leeds and Bradford Railway Company, which was incorporated before that day, and require the further assistance of Parliament only to be enabled to issue new shares and raise additional capital. The parliamentary contract shews that no new Company was contemplated. It recites "that it had been deemed expedient that a railway should be made by the Leeds and Bradford Railway Company from Shipley to Colne, in extension of and uniting with the parliamentary line of the Leeds and Bradford Railway." The very title of the new act & 9 Vict. c. xxxviii, is "An Act to enable the Leeds and Bradford Railway Company to make a branch from Shipley to Colne." And sect. 3 gives power to that Company to raise an additional sum of money by subscription [*Parke, B.*—Are the new shareholders to share in the general profits of the whole line, or only in those of the extension?] By sect. 4, the capital to be raised on the new shares is to be part of the general capital of the Company and subject to the same provisions; and, by sect. 5, if the old shares are at a premium, the new shares are to be offered to the original shareholders. The contract is made with the old Company, into which the new shareholders are incorporated.

3. As to the amount of damages, *Stewart v. Cauley*

(a) *Antè*, p. 135. (b) *Antè*, Vol. 2, p. 616; 8 M. & W. 16

decides, that, in the case of contracts for shares, when the shares are not accepted and are resold within a reasonable time by the vendor, the measure of damages is the difference between their price at the time of the contract and at the time of the re-sale. Here the contract was broken on the 10th of March, the day fixed by the plaintiff, and it is not unreasonable that he should have till the 30th to purchase others; therefore, the damages should be estimated by the price of shares on that day. [*Parke, B.*—In the present state of things, half a day might be a reasonable time to purchase fresh shares.] The wrong-doer, at all events, should incur the greatest risk.

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Knowles, contra.—The question on the 26th section of the 7 & 8 Vict. c. 110, was not intended to be discussed, but only whether this was a Company formed since the 1st of November, 1844. [*Parke, B.*—We certainly cannot allow the case of *Young v. Smith* (a) to be re-argued. It must be taken as the decision of this Court, and if parties are dissatisfied with it, they must go to a higher tribunal.] Then the Leeds and Bradford Railway Company, and the Shipley and Colne line are essentially different undertakings, differing in their names, the value of their shares, and their constituent members. The stat. 8 & 9 Vict. c. xxviii, and the resolution of the directors of the 4th November, 1844, both speak of the latter as a new line; and there are several provisions in the 7 & 8 Vict. c. lix, by which the Leeds and Bradford Railway Company was incorporated, which are inapplicable to the new line. But, even supposing the name and capital of the two Companies were the same, that would not make them identical, as they have different objects, and are to be carried out at different places.

PARKE, B.—The question on the 26th section of 7 & 8

(a) *Antè*, p. 135.

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Vict. c. 110, does not arise here. I think it is quite clear that the Company in question is not a new Company formed since the 1st of November, 1844. The 8 & 9 Vict. c. xxxviii, was not intended to form any new Company and only extends the powers of an old corporation, by enabling them to do what they could not have done before, namely, to construct a new line of railway, and, for that purpose, to raise additional capital by means of new shares instead of by mortgage or other similar means; which new shares have a different value in the market, because they vary in proportion to the money paid in on them. It is said, that the Colne and Shipley line was for a different object than the Leeds and Bradford Railway Company and not to benefit the shareholders of the latter. But the Leeds and Bradford Railway Company is incorporated and although the capital of a corporation belongs to the corporation, the right to the profits is the right of the individuals who compose it. The corporation is seised in fee of the corporate property, and the individuals have nothing but their share of the profit and loss on the undertaking. In the present case, if the members of the old corporation will not take the new created shares, fresh subscribers are to come in and take their share of the profit and loss of the concern; but it was not intended to create a new Company for the old one is to remain with the same name and the same common seal; and all that can be said is, that the undertakings are different.

As to the amount of damages, I at first supposed that this was like the case of an action against a party for not replacing stock, in which, according to *Shepherd v. Johnson* (a) and *M^r Arthur v. Lord Seaforth* (b), the proper measure of damages is the price of the stock on the day when it ought to have been replaced, or the price at the day of trial, at the option of the buyer. But the case before us more re

(a) 2 East, 211.

(b) 2 Taunt. 257.

sembles an action for not delivering goods sold. In *Gainsford v. Carroll* (a), where a vendee brought his action against the vendor for not delivering a quantity of bacon, which, according to the agreement, was to be paid for on delivery, the secondary, on a writ of inquiry, told the jury that they were at liberty to calculate the damages according to the price of the bacon on the day when the writ of inquiry was executed, and that the difference between that and the contract price ought to be the measure of damages. Those cases were then cited, but the Court held that they did not apply; that it was not like the case of a loan of stock, where the borrower holds the money of the lender in his hands, and thereby prevents him from using it altogether; there the plaintiff had his money in his possession, and might, on the very day after the contract was broken, have indemnified himself by going into the market, and purchasing other bacon of the same quality; and, if he had sustained any loss by neglecting to do so, it was his own fault; and, consequently, that the true measure of damages was the difference between the price agreed on and the market price on or about the day when the contract was broken. That rule has been constantly followed ever since in actions for not delivering goods; it may or may not be a just one in all respects, but, being the established practice, it is better to adhere to it. In the case before us, then, as in that, the plaintiff had his money in his own possession, and, on the defendant's failing to perform his contract, might have gone into the market and purchased shares for himself at the market price. The question then comes to this; when was this contract broken? The plaintiff, in his letter of the 3rd March, gave the defendant five days, namely, until the 10th March, to deliver the shares; and he is, consequently, not entitled to calculate his damages according to the amount they might have sold for on any day subsequent to the 10th.

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(a) 2 B. & C. 624.

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Our judgment, therefore, will be to order the verdict on the third and fourth pleas to be entered for the plaintiff, and to reduce the damages which have been assessed, from 675*l.* to 450*l.*

ALDERSON, B.—Either this was the Leeds and Bradford Railway Company or it was a new Company, If it was the Leeds and Bradford Railway Company, then it was instituted before the 1st November, 1844; if it was not the Leeds and Bradford Railway Company, but a new Company, still it is a Company incorporated by act of Parliament, and such, by the express provisions of 7 & 8 Vict. c. 110, s. 2, are not affected by that statute. In truth this undertaking is not a co-partnership at all, and only arises from the power given in the 8 & 9 Vict. c. xxxviii to the Leeds and Bradford Railway Company, to introduce new corporators into their body. It is just the same as if they had done this new work out of their surplus funds.

ROLFE, B., concurred.

PLATT, B.—By the 55th section of the 7 & 8 Vict. c. liii leave was given to the Leeds and Bradford Railway Company to convert a portion of the money which they were empowered to borrow into equivalent shares. The new shareholders were then made new corporators, but the introduction of those new corporators did not destroy the old body.

Judgment accordingly.

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COURT OF CHANCERY.

BEFORE V. C. WIGRAM.

PARSONS v. SPOONER and Others.

Jan. 17th & 18th.

THE bill in this case stated, that, in August 1845, the plaintiff, at considerable labour and expense, projected and put forward a scheme of a railway which had ever since been known by the name of "The Southampton, Manchester, and Oxford Junction Railway," and that he had made known his scheme to the public by advertisement and otherwise, and several gentlemen of wealth and importance expressed their approbation thereof, and stated that they were ready to assist the plaintiff in promoting this scheme, and in forming a Company to carry the same into effect.

A plaintiff, a solicitor, was the promoter of a railway scheme, which he caused to be provisionally registered, and at a public meeting made a statement of the steps taken by him with reference to such scheme. At this meeting certain persons were nominated to form a provisional committee, and at the same meeting, on a suggestion by the chairman, the plaintiff gave an indemnity to each of the provisional committee-men against any personal liability

That, on the 19th of the same month, a return of all the necessary documents was duly made at the Registry Office, and a preliminary prospectus of the said scheme, signed by one of the promoters thereof, was duly registered at the same office in compliance with the act of Parliament in that behalf.

That a meeting was held at the Hall of Commerce, whereat plaintiff made a full statement of the objects and

liability in respect of the costs of prosecuting the scheme up to the time of the payment of the deposits, and undertook that he would pay all future costs, and look for payment thereof out of the first assets of the Company received by way of deposits or otherwise; and the committee agreed that he should receive such costs out of the deposits.

The deposits were paid up to the amount of £50,000, and shortly afterwards the services of the plaintiff were discontinued, whereupon he brought in his bill, and demanded payment thereof out of the funds in the hands of the provisional committee. A small amount was paid, but £800 and upwards remained due to the plaintiff, which the committee refused to pay, whereupon the plaintiff filed his bill, making all the provisional committee parties defendants thereto, and praying the declaration of the Court, that the deposits were effectually charged with the balance due to him, and that he was entitled to an equitable lien thereon for the same, and that the defendants might be decreed to pay the same.

The defendants demurred to the bill for want of equity, and also for want of parties.

Demurrer overruled on both points, with costs.

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advantages of his proposed scheme, and of the steps he had taken, up to that period, for carrying it into effect; and that, upon the conclusion of such statement, resolutions were passed, the first of which was, That the meeting had heard with satisfaction the statement of the steps taken by the plaintiff towards the formation of the Southampton, Manchester, and Oxford Junction Railway, which, in the opinion of the meeting, was a sound and useful project, and likely to be remunerative to the shareholders, and that the plaintiff be requested to continue his exertions for the accomplishment of that object. And, by another resolution, it was determined that certain persons therein named should form a provisional committee for the purpose of forwarding the said project.

That all the defendants consented to become, and had since acted as members of the provisional committee, and were severally shareholders in the said Company.

That, during the meeting, it was suggested to the plaintiff by B. Oliveira, the chairman of the said meeting, that it was usual for the projector, solicitor, and other officers of similar schemes, to take upon themselves the sole risk and responsibility of the undertaking, and to indemnify the committee therefrom, and he handed to the plaintiff the draft of an agreement to that effect, which the chairman stated had been entered into in reference to another project.

That plaintiff, relying on the good faith of the committee that he would be continued solicitor to the project, and that he would be paid his costs immediately upon a sufficient amount of deposits or assets being obtained for that purpose, at once acceded to such proposition, and a memorandum of agreement was, with the consent of plaintiff, appended to the minute of the resolutions, signed by the chairman to and on behalf of all present, viz.—“Memorandum: The solicitor and other officers, as they may be appointed, hereby pledge themselves to pay all preliminary expenses, and hereby give a general indemnity to

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the provisional committee, collectively and individually, against all costs and charges of any sort that may be incurred in prosecuting or promoting this scheme up to the payment of the deposits, to which fund alone they look for repayment of such expenses and disbursements, and for professional remuneration; the committee agreeing to repay such costs, expenses, and disbursements, and the reasonable proper costs of the said officers out of the said deposits."

That plaintiff, on the requisition of the chairman, sent a printed agreement, signed by him, to each member of the committee, which was as follows:—"I, the undersigned, being the solicitor to the above project, do hereby declare and agree that I do not hold any patron or member of the provisional or managing committee thereof in any way liable or responsible to me for the repayment of any money I may have expended or shall expend in the projecting, promoting, or prosecuting this project, or for the payment of any charges for professional or other services rendered by me in relation thereto, or in any way connected therewith, and I declare and agree that I look to the deposits or joint stock of the said Company alone, as the funds and means of repayment of such disbursements, and payment of professional and other services; and I undertake to pay and discharge all expenses incidental to the said project, and the prosecuting thereof, and the formation of the Company, up to the time of payment of deposits upon shares sufficient in amount to repay, satisfy, and discharge all payments, disbursements, and liabilities made or incurred in respect to the matters aforesaid, or any of them, up to that time; the said deposits or joint fund being held liable for such purpose by the directors or trustees of the Company."

That the plaintiff's whole time and exclusive attention was devoted to the concerns of the Company, and that he was registered as their solicitor, and prepared advertise-

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ments, &c., and expended large sums of money out of his own pocket, and incurred great liabilities. That the scheme became a great favourite with the public, and that the applications for shares were ten times as numerous as the shares, which consequently rose to a high premium.

That the deposits paid in amounted to £50,000, and the necessary Parliamentary contract and subscribers' agreement were signed by the several persons to whom shares had been allotted, and all the defendants, previous to their receiving the scrip certificates. That the subscribers' agreement, after appointing the defendants as the provisional committee, provided, that, in order to constitute a board, three members of their body at least should be present. That the said directors should have full power, out of the monies which should come to their hands, or be placed to their credit, by way of deposit or payment of calls, or otherwise, in relation to the said undertaking, to make such deposits or investments as then were or might be required by the then present or any future standing orders of both or either of the houses of Parliament, and also to pay and allow all such fees, salaries, and recompense to bankers, counsel, solicitors, party agents, &c. who might be employed or retained, or who might then have been already employed or retained in the projecting of the said undertaking, or in supporting and protecting the interests thereof, or in opposing any competing projects, scheme, or line or lines of railway in Parliament, or otherwise, in relation to the said undertaking, as they should think right, and generally to apply such monies in and towards the fulfilment of any bargains, engagements, contracts, arrangements, or agreements, into which they or the projectors thereof might have entered, or into which they were thereby empowered to and should enter for the purposes thereinbefore mentioned, or any of them, and towards the costs of any works or proceedings connected therewith, and in and towards the soliciting, sup-

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porting, or opposing such bill or bills in Parliament as thereinbefore mentioned, and in obtaining the necessary act or acts for carrying out the aforesaid undertaking, or any parts or part thereof, and, generally, in paying and satisfying all other costs, charges, expenses, and liabilities which might have been already sustained or incurred in relation to the said undertaking, and which, in their opinion and discretion, ought to be paid and satisfied.

That, immediately after the deeds had been executed, other solicitors were associated with plaintiff, notwithstanding his remonstrances, and, on the 7th of November, he was informed by the board, that, in consequence of an arrangement with another Company, the plaintiff's services would no longer be required.

That plaintiff sent in a bill of costs to the Company, in respect of which he had received £250 only, and that £897 remained due. The bill, after stating many applications made by letter to the defendants for payment, charged, that the present provisional committee of the said Company (all of whom were defendants to the bill) had alone the whole control and management of the funds of the Company, and that they had authority of themselves to apply any part of the deposits in satisfaction of plaintiff's demand.

That the other shareholders in the said Company were so numerous, and their shares so fluctuating, that plaintiff was unable to discover the names of such shareholders or make them parties to the suit. And the bill prayed that it might be declared, that, under the circumstances, the deposits, which came into the hands of the said defendants, were duly and effectually charged with the payment of all the expenses paid and incurred by plaintiff in the promotion and carrying into effect of the aforesaid scheme, and of plaintiff's professional and other costs, charges, and expenses, and that plaintiff was entitled to an equitable lien and first charge upon the amount of deposit then in the hands of the said defendants [naming them], or any of them,

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in respect of the aforesaid balance or sum of 897*l.* 9*s.* 1*d.*, due to plaintiff upon his said bill of costs; and that all proper accounts might be directed to be taken for the purpose of ascertaining the amount then remaining due to plaintiff in respect of his aforesaid costs, disbursements, charges, and expenses, and that it might be declared that plaintiff was entitled to a like equitable lien in respect of the amount, which, upon taking such accounts, should be found due to him; and that the said defendants might be decreed to pay such balance or amount to plaintiff; and in the meantime might be restrained by injunction from parting with, depositing, or assigning, transferring, or disposing of the monies and securities of the said Company in their hands or power, or any of them, or any part of the same, to any other Company, or to any other person.

This came on upon a demurrer to the plaintiff's bill for want of equity and for want of parties.

Mr. Teed, Mr. Romilly, and Mr. Shapter, in support of the demurrer.—The contract entered into by the plaintiff with the defendants is invalid, on two grounds: 1st, because the parties contracting with the plaintiff had no power to enter into such contract; and, 2ndly, because the contract itself is for an illegal object. With respect to the first point, it is contended that all railway Companies come within the act 7 & 8 Vict. c. 110 (*a*), and that they can only proceed in accordance with its requisitions. The persons who entered into the contract with the plaintiff were not, or at least it is not sufficiently averred in the bill that they were at that time provisionally registered, and therefore cannot be considered a Company at all; but, even if they were provisionally registered, they can do no act which will bind the shareholders, until they have obtained the certificate of complete registration.

(*a*) See *Young v. Smith*, *antè*, p. 136, where the material sections of the statute are set out. As,

however, this point was not decided in the judgment, the further argument upon it is omitted.

If the plaintiff can, at any time, maintain his right to the benefit of the contract, he cannot at all events do so until the Company has been completely registered; therefore this suit is premature.

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The memorandum signed by Mr. Oliveira cannot render the plaintiff's claim valid: *Allison v. Hering* (a).

As to the 2nd point, the Court will not permit a solicitor to take security for costs *to be* incurred; and there is no distinction between charges and disbursements: *Uppington v. Buller* (b), *Jones v. Tripp* (c). And, as to past costs, they who have become shareholders since the agreement are not bound so that the plaintiff can claim a lien on the deposits made by them for the amount of his charges.

The objection to the bill for want of parties is founded on this, that the plaintiff claims a lien on the funds of shareholders, none of whom are before the Court; for there is no allegation to shew that the provisional committee, who are the only defendants to the bill, have paid one farthing in respect of any share.

Mr. *Kenyon Parker* and Mr. *Hetherington*, in support of the bill.—This is a suit in which the relief prayed is entirely independent of the act. The plaintiff rests his case on an agreement entered into with certain individuals who have recognised it, and have power in themselves to fulfil it. The act of registration by Railway Companies is not compulsory, but the object of it is to invest Companies thereby with certain privileges which they could not otherwise have: *Edwards v. Great Western Railway Co.* (d). It matters not whether the Company have or have not complied with the act, the agreement remains valid. As to the objection that this is a security for future costs, it is clear that, at the date of it, costs had been incurred which all the parties to the agreement were well aware of, and intended to secure to the plaintiff.

(a) 9 Sim. 583.

(b) 1 Conn. & Law. 291.

(c) Jac. 322.

(d) Antè, Vol. 1, p. 173.

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In answer to the objection for want of parties, the following cases were cited :—*Lund v. Blanshard* (a) ; *Larpent v. Richardson* (b) ; *Adair v. The New River Company* (c) ; *Meux v. Maltby* (d).

Mr. Teed replied.

The VICE-CHANCELLOR (after stating the facts of the case).—I am very glad to have been able to find grounds satisfactory to myself for overruling the demurrer without giving any opinion upon the important point of law which has been argued before me. I am glad, I say, because the arguments upon several of the points depended upon verbal criticisms which the plaintiff, by amending his bill, might easily have avoided, and have made it impossible to demur to it. Very little good is done by demurrers relying merely on verbal criticism.

The first and principal point which has been argued was founded upon the late act 7 & 8 Vict. c. 110, (the Joint Stock Companies Registration Act). It was contended that Railway Companies were within that act, and that it appeared upon the face of the bill that the provisions of that act had not been complied with, and therefore the whole transaction was void, and that no contract made between the plaintiff and the provisional committee could be valid, so as to be enforced in a Court of Equity. I do not mean to give any opinion upon that question (e); but I must assume, for the purpose of the argument, that this case was within the provisions of the act. The bill alleged, in very general terms, that certain steps were “duly” taken with a view to the registration of the proceedings of the Company. Nothing can be more unsatisfactory than the general allegation of steps being duly taken,—very frequently that general form is used for the purpose of evasion. Looking at the bill throughout, the plaintiff alleges

(a) 4 Hare, 290.

(b) 2 Y. & C. 507.

(c) 11 Ves. 429.

(d) 2 Swan. 277.

(e) See *Young v. Smith*, ante, p. 136.

that all the steps stated to have been taken by the Company were duly registered, and he went on to allege specially all the various steps which had been taken, (viz.) the appointment of the provisional directors for the purpose of carrying on the project, the compliance with the standing orders, and stating that they were about to apply to Parliament. What the defendant required the Court to do was as follows:—Admitting that they were acting as a Company, and that their right to do so was entirely founded upon steps taken which they said were illegal, they called upon the Court to infer from the general allegations of the bill that these steps had not been taken; but they admitted that they had acted since their formation, and were now acting as a Company, and were about to go to Parliament, yet they asked the Court to assume that the general allegations were untrue. I cannot, upon a general demurrer, make that assumption. The defendants admit all the specific allegations in the bill, and, if true, they are now acting as a Company, and formed their proceedings entirely upon the preliminary steps which have been taken by the plaintiff on their behalf. This leaves the case free from difficulty.

The next question is upon the contract itself. A provisional committee had been appointed on the 27th August, 1845. A circular letter, signed by plaintiff, upon the requisition of Mr. O., acting on behalf of all, has been issued. This has been acquiesced in, and the plaintiff has taken all the steps out of which his present demand arises, upon the faith of that circular.

Assuming for the present that the contract is a legal one, the question is, how far the present Company will be affected by it. The bill states the agreement which was made by the provisional committee; it then goes on to state the subsequent proceedings under which the provisional directors had been appointed, and the Company acted, in the allotment of shares; the payment of deposits to the amount of £50,000, and the carrying on of the affairs of the Company under these circum-

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stances. If there had been one continued transaction in which the provisional committee had acted at first, and they had acted since, he must assume that the provisional directors of the Company were now proceeding upon the basis of what had been done by the committee, (for there had been no interruption), and they were bound by a legal contract made by them for the payment of expenses properly incurred in the preparation of a scheme which had been acted upon and carried on down to the present time. This conclusion was inevitably to be drawn from the bill before the Court. I am bound to say, that, if the agreement be legal, the Company are bound by it. It is, however, stated by the defendants that the agreement is illegal; that the provisional committee are to be viewed as trustees for the Company, and that being so, they did an illegal act in contracting with the plaintiff, who was solicitor to the Company, that they, the provisional committee, should not be personally liable to the solicitor, but that the solicitor should be paid out of the fund. The argument was, that the trustee had no right to make that species of contract with the solicitor, because (as it was said) it deprived, or tended to deprive, the cestuis que trust of the benefit of that security which they would have for the diligence of the trustee himself, if he were acting upon his own personal liability. I cannot accede to that argument. *Prima facie* the trustee has a right to be indemnified by his cestui que trust, before he incurs any liability. An indemnity is not often required, because, generally speaking, a trustee retains in his hands funds by which he is able to indemnify himself. The Court will not take them out of his hands until he has been paid all expenses properly incurred; and, on the other hand, the cestui que trust has this security, that the Court will only allow such expenses as have been properly incurred by an acting trustee. Every step which a trustee takes is one taken with a knowledge on his part that he will be indemnified for all expenses properly incurred; I do not therefore see, upon the specific allega-

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tions in this bill, of what security the cestui que trust is deprived (if he be deprived of any), of which he is not liable to be deprived under the general rules of this Court; he can always have the conduct of his trustee investigated, and the latter will not be allowed any expenses not properly incurred. Upon this ground (not meaning to intimate that there might not be cases in which such an objection might not apply) I am of opinion that there is nothing to shew any illegality in this contract.

Another ground on which its illegality has been argued, is, that this is a contract with a solicitor, by his client, for security for his costs, and that no solicitor can be allowed to contract for a security for his expenses before those expenses have been incurred, whether professional or costs out of pocket. Assuming that to be the rule of the Court, this question does certainly arise, if a client, being a trustee, stipulate with a solicitor that he shall not make a demand upon him personally, and agree with him that when funds are in hand he shall be paid out of those funds such claim as he had a right to make against them, and it appears to me impossible to distinguish such a contract from the case put in argument; but I need only say that the present case does not fall within this general rule, because, looking at the two documents, the one signed by Mr. Oliveira, and acquiesced in by the Company, and the other signed by the plaintiff, and circulated at the request of Mr. Oliveira, and acquiesced in by the Company, I think, upon a fair construction of these two instruments, and the facts stated in the bill, there were some expenses incurred by the plaintiff, in promoting the scheme, prior to the appointment of the provisional committee, to the payment of which he might be entitled. There is nothing illegal in the contract with Mr. Parsons that he should, out of the deposits, be paid those expenses which had been incurred in the preparation of the scheme adopted by the provisional committee on the 27th of August; and, if so, there will be sufficient to entitle the party upon the bill to

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some relief, although he may not be entitled to all he asks. The next objection (which is merely a verbal criticism, is, that it does not appear in the allegations of the bill, or rather that it is excluded by those allegations, that the provisional committee, or any member of it, has paid up his deposits. It does not appear to me necessary, in any view of this case, to go into this matter: but, if it were necessary, I should say, that, upon the allegations in the bill, it must be taken that the provisional committee had paid up their deposits, for, although the case is open to this verbal criticism, that persons were alleged in one part of the bill, in terms, to have paid up their deposits when the shares were allotted to them; yet, it is consistent with that allegation, that none of those shares had been allotted to the provisional committee-men; however this may be, it is alleged that all the members of the provisional committee are shareholders, and I cannot assume that their deposits have not been paid.

Upon the question of parties, the bill charges that every one of the persons who are defendants on the record are provisional directors. Now, it is said, that, if there are any deposits which have not been paid in full, or which have not been paid at all, the plaintiff has no right to a lien upon the paid deposits. The plaintiff alleges that the number of the shareholders is so great that he cannot name them. If all those who are named upon there cord, and who are all the provisional directors of the committee, oppose the claim *in toto*, I do not know how I can require the plaintiff to do more. The demurrer must, therefore, be overruled upon both points.

Mr. *K. Parker* asked for leave to give notice of motion for the following day, to restrain the Company from parting with the funds.

The VICE-CHANCELLOR refused the application, on the ground that there was no allegation in the bill, that the Company were going to part with the funds.

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**£ C. RIGBY v. THE GREAT WESTERN RAILWAY Jan. 14 & 15.
COMPANY & S. G. GRIFFITHS.**

amended bill in this suit, after stating the incorpo- The defend-
of the Great Western Railway Company, and the ants, the Great
on of it to Exeter, set forth that a station was Western Rail-
by the Company, and then existed, near Swindon, way Company,
in considera-
and expenses
incurred by the

a building refreshment and other rooms at Swindon, granted them a lease for ninety-
at a nominal rent, which contained covenants on the part of the lessee to maintain
ment-rooms, &c., in a suitable manner; and on the part of the Company, that no
refreshment-rooms, other than those erected by the plaintiffs, and those at the terminal
of the railway, should be erected by the Company; and that, in case the Swindon
should become disused, the Company should purchase back the plaintiffs' buildings, on
terms; and in the said lease was contained the following clause:—"And it is hereby
to be the intention of the said Company, and the understanding of the said plaintiffs,
in consequence of the outlay to be incurred by them in erecting the said refreshment-
Swindon, and preparing such other works as aforesaid, the Company shall give every
the said plaintiffs for enabling them to obtain an adequate return by means of the
profits to be derived from the said refreshment-rooms, and that all trains carrying
passengers, not being goods trains, or trains to be sent express, or for special purposes,
or trains not under the control of the said Great Western Railway Company, which
stop at the Swindon station, either up or down, shall, save in case of emergency, or unusual
delaying from accidents, stop there for refreshment of passengers for a reasonable period of
fifteen minutes; and that, as far as the Company can influence the same, trains not under
their control shall be induced to stop for the like purpose, and the Company engage not to do
anything which shall have an effect contrary to the above intention."

The plaintiffs underlet the premises to G. for seven years, and entered into a covenant with
him for quiet enjoyment; and, further, that they would, during the continuance of the term
of years, do all such acts and things as should be necessary and proper for enforce-
ment and performance of the covenants entered into by the Company with the

plaintiffs' trains belonging to the Company, called "express" trains, passed the Swindon
station without stopping a sufficient time to allow the passengers to get refreshment.

The plaintiffs, without the assent of their sub-lessee, filed a bill against the Company, and
asked for an injunction.

The directions, directed by the Court for the purpose of establishing the facts of the case, having
been given in favour of the plaintiffs.

The Court held that the plaintiffs had a sufficient interest to entitle them to carry on the suit. That
the Court will not consider the question of convenience to the public or the Company, but, in a
case of this kind, will treat the Company as individuals. That, in a case in which it would be im-
proper to measure in damages the loss from a breach of covenant, and the plaintiffs
recover such speculative damages as a jury may give them in repeated actions, a court
will interfere by injunction to protect the plaintiffs' right to the specific performance
of the covenant.

Where mutual rights of parties rest in covenant, each party is entitled, *prima facie*, to
enforce his rights in respect of any covenant broken, either in a Court of law or equity, notwith-
standing that such party may, at the time, be liable in respect of other covenants (a).

The trains, called "express" trains in the train bills of the Great Western Railway Com-
pany, do not come within the exception contemplated by the above covenant.

(a) See *Rolfe v. Rolfe*, 10 Jur. 61.

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which was used as the regular and general place of stoppage for trains, and was adjoining to certain refreshment, waiting, and other rooms, to be erected by the plaintiffs, under an agreement between them and the Company, which was carried out by a lease bearing date the 18th day of December, 1841.

That, by such indenture, it was witnessed, that, in consideration of the costs and expenses incurred and to be incurred by the plaintiffs in and about the buildings therein before mentioned, and for other considerations, the Great Western Railway Company demised unto the plaintiffs the said refreshment, waiting, and other rooms, from the 25th of December, 1841, for ninety-nine years, at a nominal rent, and they covenanted with the plaintiffs that no general refreshment-rooms, or stopping places, for the purpose of enabling passengers to procure refreshments, other than and except the refreshment-rooms agreed to be erected by the plaintiffs, and those at the termini at Bristol and Paddington respectively, or at any terminal station on the Great Western Railway, or any branch or junction line, or any intermediate station for the convenience of passengers joining or leaving trains at such station, should be erected on the Great Western Railway or by the said Company. And that, in case the Swindon Station should, during the continuance of the said lease, be discontinued, the Company should purchase of the plaintiffs the whole of the buildings on the said station, at the full amount of the cost and expenditure in respect thereof, in case such disuse should take place within five years from the date thereof; but, if afterwards, then at a fair price to be fixed by arbitration; and that the said Company should also make compensation (the amount to be ascertained by arbitration) to the plaintiffs, their underlessees, occupier or occupiers, for the time being, of the premises, for the loss which they, and each and every of them should sustain, in consequence of being deprived of the future profits. And it was thereby declared

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to be the intention of the said Company, and the understanding of the plaintiffs, that, in consequence of the outlay to be incurred by them in erecting the said refreshment-rooms at Swindon, and preparing such other works as therein mentioned, the Company should give every facility to the plaintiffs for enabling them to obtain an adequate return, by means of the rents and profits to be derived from the said refreshment-rooms; and that all trains carrying passengers, not being goods trains, or trains to be sent *express or for special purposes*, and except trains not under the control of the Great Western Railway Company, which should pass the Swindon station, either up or down, should, save in case of emergency or unusual delay, arising from accidents, stop there for the refreshment of passengers for a reasonable period of about ten minutes; and that, as far as the Company could influence the same, the trains not under their control should be induced to stop for the like purpose, and the said Company thereby engaged not to do any act which should have an effect contrary to the above intention.

That the refreshment and other rooms had been completed at a cost to the plaintiffs of £25,000 and upwards, and that, by an underlease, dated the 24th of December, 1841, the plaintiffs demised the same to S. G. Griffith, for the term of seven years, at a yearly rent of £1100, and covenanted with him at all times during the continuance of the term to do all such acts and things as should be necessary and proper for enforcing the fulfilment and performance of the covenants and agreements contained in the lease, on the part of the Company, for giving the full benefit and advantage to the said S. G. Griffith, of the said refreshment-rooms and premises during the said term of seven years, in the same manner as if the said defendant S. G. G. were the assignee of the said covenants.

That for some time trains had run regularly from Paddington to Exeter, and from Exeter to Paddington, and

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had regularly stopped at the Swindon station for refreshment, according to the agreement, and that large sums had been received and very large profits made by the defendant, S. G. G., by reason of the trains so stopping.

That, since the 10th of March, trains had run from London to Exeter, and from Exeter to London, in five hours which were called quick trains, and which stopped at the Swindon station: but that lately the Company had determined that these trains should perform the distance four-and-a-half hours instead of five; and, for the purpose of enabling them so to do, should not stop for refreshment at the Swindon station, and for the purpose of evading the performance of their agreement with plaintiffs, the trains theretofore denominated "quick" trains were called "express" trains.

That the defendant, S. G. Griffith, insisted that the plaintiffs, under their said covenant, were bound to take all necessary proceedings for restraining the Company from permitting the express trains to pass the Swindon station without stopping, and threatened and intended to hold the plaintiffs liable for any loss he might sustain thereby, but he refused to join them as a co-plaintiff, although they had offered to indemnify him. And the bill prayed that the Railway Company might be, in the meantime, and until the hearing of the cause, and thenceforth during the residue of the term of ninety-nine years granted to the plaintiffs, restrained by injunction from directing or permitting the express trains, or any of them, to pass the Swindon station, either up or down, save in case of emergency or unusual delay, &c., [in the words of the covenant] and that all proper accounts might be taken, and inquiries directed, for ascertaining the loss which might arise by reason of the trains called "express" not stopping at the Swindon station, and that the amount of such loss might be made good by the Company, &c.

The original bill was filed on the 10th of May, 1846, and the defendants put in a general demurrer for want

equity; which was overruled, and thereupon a motion was made for an injunction, and, on the 15th of May, his Honor made the following order:—

The defendants, the Great Western Railway Company, by their counsel, undertaking to keep an account of all passengers who should daily pass the Swindon station in the trains called “express trains,” in the plaintiff’s bill mentioned; and also to keep an account of all passengers who should daily pass the same station in trains which should stop there for the purpose of refreshment, and also to account, as this Court might direct, (in case the Court should think fit to make any order for that purpose), for any loss which might be sustained by the parties entitled to the benefit of the covenants in the lease, dated the 18th of December, 1841, mentioned, the Court did order that the motion should stand over, with liberty to the plaintiffs to proceed at law touching the matters complained of by the bill. And for the purpose of expediting the decision of such matters, it was ordered that the plaintiffs should be at liberty to bring two actions at law touching such matters; and in one of such actions it was ordered that the said defendants should demur to the declaration, and in the other of such actions that the said defendants were not to demur or deny the execution of the said indenture of lease, dated the 18th of December, 1841, but were to have liberty, by their pleas, to deny other matters of fact stated in the declaration. And it was ordered that the said defendants, the Great Western Railway Company, should appear instanter to the said action, and plead and demur, respectively, within the times allowed by the practice of the Court in which such actions should be brought, without making any application or applications for further time. And it was ordered that the plaintiffs should join in demurrer, and reply within four days after demurrer and plea, respectively, and set down the demurrer for argument without delay. And it was ordered that the plain-

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tiffs should try the issues of fact at the sittings after Trinity Term, in London or Middlesex; and it was ordered that the said defendants should consent to the said cause being set down at once, and the costs of the actions to be dealt with as the Court should direct, with liberty to the plaintiffs to amend their bill.

Subsequently to the last-mentioned order, the plaintiffs commenced two actions against the defendants, one on the 15th, and the other on the 24th of May (a).

The Great Western Railway Company put in their answer to the bill on the 5th of December, 1845, and thereby, amongst other things, set forth a covenant contained in the underlease of the 24th of December, 1841, on the part of the plaintiffs, and not set out in the bill, that it should be lawful for S. G. Griffith to bring, commence, carry on, and prosecute any action, suit, or other proceeding whatsoever, for enforcing the fulfilment and performance of the covenants and agreements in the last-mentioned indenture contained, or any of them, the said S. G. G. indemnifying the plaintiffs from all costs; and they submitted that the plaintiffs had not any right or title to institute or prosecute the suit, and claimed the benefit of the objection as if they had demurred to the bill.

The defendant, S. G. Griffith, put in his answer to the said bill on the 6th January, and thereby, after admitting the statements in the bill, said that he had not hitherto insisted or called on the plaintiffs to take any proceeding against the Company to enforce the covenants in his underlease, because he believed that the Company had been and then were, desirous of settling all matters in difference; but he insisted that plaintiffs were (when requested so to do by defendant), under these said covenants, and some of them, bound to take all necessary proceedings for restraining the Company in the manner in the bill men-


(a) The actions at law are reported post, p. 190.

tioned, and that he intended to hold the plaintiffs liable for any loss that had arisen, or might arise, to him in consequence of the Company permitting the trains to pass Swindon Station without stopping for refreshment.

The two actions at law having been decided in favour of the plaintiffs (*a*), they now renewed their motion to the Court for an injunction in the terms of the prayer of the bill.

Mr. *Wood*, Mr. *Baily*, and Mr. *Fitzherbert*, in support of the motion, contended that the decisions of the Court of law having been in favour of the plaintiffs, they were at once entitled to the injunction.

Mr. *Romilly*, Mr. *Stevens*, and Mr. *Unthank*, for the defendants, the Great Western Railway Company, admitted that the plaintiffs had succeeded on the points submitted for the opinion of a Court of law, but contended that the questions of fact had not been decided,—that express trains, which reach Exeter in four and a half hours, are not merely so named, but are “express” trains within the meaning of the agreement. The fact of the trains being sent regularly and periodically does not take them out of the general meaning of that word. There are expresses daily from Paris, and expresses at stated times from India, but no one can contend that they are not, *nomine et facto*, express. They contended that the word “express” was different from the words in the same clause, “sent for a special purpose.” Effect must be given to all the words, and they must not be considered as synonymous. Again, they contended that the objection taken by the answer, *viz.* that the plaintiffs had no interest whereon to commence or prosecute this suit, was a good and valid objection, inasmuch as Griffith could have no right to bring an action

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against the plaintiffs until he had requested them to commence proceedings against the Company, and they had refused to comply with such requisition; and that Griffith not having made such application, the plaintiffs incur no responsibility, and that at all events they were entitled to have the opinion of a Court of law upon this point.

Mr. *Amphlett*, for the defendant, S. G. Griffith, urged the statements made by his answer.

The VICE-CHANCELLOR.—The question which I have to decide in this judgment is not what decree is to be made at the hearing of the cause, but what order, if any, is proper to be made until the cause shall be heard. The application upon which I am now about to state my opinion is an application to restrain the Great Western Railway Company from passing the Swindon station with certain trains, called by them “express trains,” without stopping at Swindon for the refreshment of passengers. Those trains do stop at Swindon for the purpose, I think, of letting out passengers going to Swindon, and taking up passengers going from Swindon, and for the further purpose of taking in water at Swindon, but not for the purpose of the refreshment of passengers, nor long enough to permit of passengers leaving the trains for the purpose of refreshment. [His Honor then proceeded to state the facts of the case.] There are some questions upon which I may at once, and without argument, state my conclusions. The defendants, for the purposes of this motion must be considered as private individuals. They cannot be heard to excuse a breach of contract with the plaintiff upon the ground only that the convenience of the passengers may be consulted by doing so.

The clause in the lease of the 18th December, 1841, by which they declared their intention that the trains should

stop, and agreed they should do so, is a legal covenant binding upon the defendants, according to the decision of a Court of law upon that question. The trains, called by the defendants "express trains," upon which this question arises, are not trains sent by express, or for special purposes, within the exception in the lease. This is the conclusion I come to for the present, as well upon the proceedings at law, as upon my individual opinion expressed upon the question of fact before the case was tried at law. Then two questions, and two only, remain ;—first, have the plaintiffs an interest in the matter in question sufficient to sustain the present bill? and, secondly, is the injury complained of one which a Court of equity should prevent by injunction in the present stage of the proceedings? With regard to the first of these questions, it was admitted that, if the second point were to be answered in the plaintiff's favour, and if this were really the suit of Griffith brought at his request in the name of the plaintiffs, the objection I am now considering would not arise. But it was said that the suit had been instituted without the previous authority, or subsequent adoption of Griffith.

Now Griffith, in his answer, says in effect that the covenant of the Company has been broken, that he has sustained, and is sustaining great daily damage thereby, and that he does hold the plaintiffs liable to him for the loss he is so sustaining, and will sustain ; but (and the reason for that is too obvious to require comment) he withholds the expression of his assent to the propriety of the present suit by the plaintiffs. This objection would certainly, upon the first mention, appear to be of a very technical character. The defendants, however, have attempted to give substance to the objection by the argument, that the plaintiffs had no interest in the suit except as the means of protecting themselves against their covenant with Griffith, and that, inasmuch as Griffith had a right to sue in the plaintiffs' name, he would not be able to recover any damage against

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the plaintiffs in consequence of their omission to sue the Company, unless the plaintiffs had first been required of him to do so, and had refused. If I were now to commit and to decide upon the construction and effect thus attempted to be given to the covenant, which I am not I certainly should not very readily adopt the defendants' argument. None of the cases appear to me to establish any such proposition. The language of the covenant appears to me rather to exclude than express any such meaning; and it may deserve consideration whether the effect of such a construction would not be in substance to strike out the first branch of the covenant I am now considering that by which the plaintiffs bind themselves to do all acts necessary to secure to Griffith the benefit of the covenant. The object of Griffith was to secure to himself, by his lease, the full benefit of the covenants in the lease of the 18th December, 1841, for which he had stipulated with the plaintiffs; and, by the very terms of the covenant, the plaintiffs have obliged themselves from time to time to do all acts necessary, and also to allow Griffith to make use of their names, indemnifying them.

Upon a covenant so worded, and whilst the liability of the plaintiffs to Griffith remains, I will not, in this stage of the cause, and after the opportunity the Company has in May last of having this, with any other legal question they might desire to raise, tried at a Court of law, and after the defendants' subsequent acquiescence in my decision upon the demurrer,—I will not, I say, in this stage of the cause, hold that the plaintiffs have not equity (for their right at law to sue is clear) to say that the covenant shall be observed at the suit of Griffith, if he wish it, and if not at his suit, then at their own. Nor I think it necessary to give my opinion whether, if the plaintiffs in the action against the Company should recover damages for the breach complained of, they would hold the

damages for the use of Griffith. It would be quite consistent with their right to sue the Company for their own protection, that Griffith should be put to his action of covenant against them. The defendants, however, insist that, in case I should come to the conclusion I have stated respecting the right of the plaintiffs to institute proceedings for the purpose of the present question, they will be entitled to have a case stated for the opinion of a Court of law. Upon that point, and in a case like this, I should certainly be very reluctant to refuse the defendants what they ask, specifying in the order that it is done at their request, should they desire me to do so, after they are advised that it will make no difference in the interim order I propose to make,—the plaintiffs consenting to such order; which consent, if a case is desired by the defendants, I might make a condition of any order I might make in the plaintiffs' favour. All the questions which have arisen upon this motion were argued in May last, and my decision upon the demurrer, and upon the motion, was an expression of my judgment to the effect I have before mentioned, except so far as my opinion might depend upon the result of the proceedings at law. I then gave the defendants the option of trying at law every legal question which arose in the case, and upon which they desired the decision of a Court of law, and the order I then made placed the obligation on the part of the plaintiffs to establish their right at law upon every point the defendants required.

Both orders, that overruling the demurrer, and that upon the motion, have since been acquiesced in; that is to say, there has been no appeal from those orders. Now the case comes before me with every point both of law and of fact decided in the plaintiffs' favour, and I am asked to suspend my judgment upon the motion until a Court of law shall have given its judgment upon one of those points which in fact was decided upon the demurrer, and upon which point, if my judgment were erroneous, an appeal

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would at once have set the parties right. The remaining question is the substantial question between the parties and involves two points: first, whether the covenant separately considered, is proper to be protected by injunction of the Court; and if that question be answered in the affirmative, whether, upon grounds to be found in other parts of the case, the plaintiffs are to lose the benefit of the injunction? On the former point I entertain no doubt whatever. The plaintiffs have expended very large sums of money under the lease, looking for remuneration to the covenant in question; nothing but the specific performance of the covenant can do justice to the plaintiffs. It would be impossible accurately to measure, in damages, the loss from a breach of the covenant, and the plaintiffs could only recover such speculative damages as a jury might give them in repeated actions against the Company. This case, like the purchase of a debt, a patent right, a copyright, and other like cases in which the injury cannot be measured in damages, is clearly proper for a Court of equity to decide.

Upon the remaining point there is, I admit, much more difficulty; and both parties have contended for extreme propositions, which it might perhaps be difficult for either to sustain. I cannot go the length of the defendants' proposition, that the plaintiffs are not to be protected by injunction in the matter of the covenant in question, only because there are other covenants to be performed by them which possibly may be broken hereafter. It would perhaps be more correct to say, that, where the mutual rights of the parties rest in covenant, each shall *prima facie*, be entitled to enforce his rights in this Court or at law, according to the nature of the covenant which may be broken. There cannot, I apprehend, be any doubt but that this Court would, at the suit of a landlord, restrain a tenant for years, under a husbandry lease, from ploughing up pasture which he had bound himself by covenant

not to break up, and that it would be no answer to a bill for that purpose for the tenant to insist that the landlord was under covenant to find him enough timber for repairs, which covenant might by possibility be broken by the landlord before the expiration of the lease. That case is very different from the case of *Gervais v. Edwards* (a). On the other hand, I am not prepared to go the length of the plaintiffs' argument in opposition to that of the defendants. It would not be difficult to suppose a case, in which great injustice might be done by compelling a party specifically to perform a particular covenant, unless the Court had the means of compelling the other parties specifically to perform some other covenant also. In this case, the plaintiffs, besides the general observation I have made, must have the benefit of the observation, that the covenant in question is in terms expressed to be specifically in consideration of the expenses incurred by the plaintiffs in building the premises, the benefit of which expenditure the defendants have had; and, with respect to any other covenant of the lease, I am not prepared to say that the Court will not, at the hearing of the cause, be able to say that perfect justice may be done to the defendants without depriving the plaintiffs of that which justice clearly requires they should have. But it is not necessary that I should express any further opinion upon this point. The order which I am now to make is an interim, and not a final order.

As to any other part of the case, the observation applies, that the points which have been argued upon the motion were involved in the decision I came to upon the argument of the demurrer in May last, and as that decision has been submitted to without appeal, and my opinion upon the case remains unchanged, it is as well to consider those points as decided for the present pur-

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(a) 2 Dru. & War. 80.

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pose, unless, upon consideration of mutual convenience or inconvenience, reasons present themselves for not making the order for the injunction.

Now, in considering that point, I have very anxiously attended to the relative positions of the two parties, and the consequence to each, of my granting or refusing the injunction. The plaintiffs have expended between £25,000 and £30,000 upon the faith of the defendants fulfilling the covenants in question, and that in terms in the lease expressed to be the consideration for the covenant. It is not suggested by the defendants that the plaintiffs have failed to perform the obligations they are under. The loss arising to the plaintiffs may, upon the evidence now before me, be fairly laid at or about £1800 a-year. The defendants have not offered any excuse for the violation of their agreement, except their own convenience and advantage, and the defendants, as I before observed, have no right in a case like this to ask me to consider them otherwise than as individuals. The express trains do stop at Swindon, and the loss occasioned by stopping and starting afresh is incurred. The additional inconvenience to the defendants, by keeping their engagement, cannot be stated at more than seven, or, at the most, eight minutes for each train; and, there is, therefore, as it appears to me, no balance of inconvenience between the two alternatives of granting or refusing an injunction.

An order, granting an injunction until the hearing or further order, will, I believe, be consistent with the practice of the Court, as it clearly will be with the justice of the case. The plaintiffs, I should observe, must in this stage of the cause, undertake to perform the covenants in the lease on their part, and the defendants must have liberty to apply. Then, if the defendants request it I shall exact a consent from the plaintiffs, that the case may be sent to law, with a view to try the question upon

which I am asked to send a case. I give no opinion, one way or other, upon it. With respect to the terms of the injunction, I will read them, and hand them down to the registrar.

The injunction will restrain the defendants, the Great Western Railway Company, until the hearing of the cause, or further order, from directing or permitting the trains mentioned in the bill, and advertised as "express trains," or any of them, to pass the Swindon station, either up or down, save in case of emergency or from unusual delay arising from accident, without stopping there for the refreshment of the passengers; and from directing or permitting any train, not being a goods train, or a train to be sent express or for a special purpose, or a train not under the control of the Company, to pass the Swindon station, either up or down, save in case of emergency or unusual delay arising from accident, without stopping there for the refreshment of passengers, in conformity with the covenants in that behalf contained in the indenture of lease of the 18th December, 1841. Then if the defendants require it, there shall be at their request, with the consent of the plaintiffs, a case directed. As I before said, the plaintiffs must, at this stage of the cause, undertake to perform their covenants; and I reserve leave to apply generally, because a case may arise out of a breach of the undertaking, or it may arise out of the decision of a Court of law upon any case to be sent.

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COURT OF EXCHEQUER.

In Michaelmas Vacation, 1845.

December 1st. **RIGBY and Another v. THE GREAT WESTERN RAILWAY COMPANY.**

In a declaration in covenant, the plaintiffs stated, that the defendants, a Railway Company, demised to them certain refreshment-rooms at Swindon, for ninety-nine years, at the yearly rent of 1*l.*, and that the plaintiffs covenanted to complete, keep in repair, and insure the said rooms; that the de-

TWO actions of covenant were brought, in accordance with the order of the Vice-Chancellor in this case (a).

The declaration stated, that whereas heretofore, to wit, on the 18th December, 1841, by a certain indenture then made between the Great Western Railway Company, established and incorporated by an act (5 & 6 Will. 4, c. cvii) intituled &c., of the one part, and the plaintiffs of the other part, one part of which &c. (profert). It was witnessed, that, in consideration of the costs and expenses incurred by the plaintiffs in and about the erection of the buildings thereafter mentioned, and thereby demised, and of the covenants, provisoes, and agreements thereafter contained, the

defendants covenanted that, in case the rooms should be disused as the regular and general place of stoppages for the refreshment of passengers, they would purchase the buildings of plaintiffs, on certain terms; that it was by the said indenture declared to be the intention of defendants, and the understanding of the plaintiffs, that all trains conveying passengers, not being goods trains, or trains to be sent express or for special purposes, or trains not under the control of the defendants, which should pass the Swindon station, up or down, should stop there for refreshment of passengers for a reasonable time of about ten minutes; and that the defendants did, by the said indenture, covenant and engage with the plaintiffs not to do any act which should have an effect contrary to the above intention. Breach, that, whilst the Swindon station was used as the regular and general place of stoppage for refreshment of passengers, the defendants caused divers trains carrying passengers, being trains under the control of the defendants, and not express trains, &c., to pass the Swindon station, both up and down, without stopping there for the refreshment of passengers, for a reasonable period of about ten minutes or any other reasonable period, and caused the said trains to stop there for a short and unreasonable period, to wit, one minute, and no more, not being sufficient to enable the passengers to obtain any refreshment there.

Held, on demurrer, that the declaration of the above intention, taken in conjunction with the rest of the indenture, amounted to an absolute covenant by the defendants, that the arrangement for trains to stop at Swindon should continue as long as the Company chose to make it the general place of stoppage for refreshment.

And that a good breach was assigned, although it was not stated that there were passengers in the train desirous of having refreshment, and who gave notice thereof.

(a) *Antè*, p. 179.

defendants by the said indenture did demise and leave unto the plaintiffs certain refreshment and waiting rooms which had then lately been erected by the plaintiffs on land belonging to the defendants, situate at Swindon, in the county of Wilts, to have and to hold the said refreshment-rooms, &c., from the 28th of December, 1841, for ninety-nine years, yielding and paying, &c., the yearly rent of one penny. That the plaintiffs covenanted with the defendants to complete and fit up the refreshment-rooms at their own expense, and that the business of the said refreshment-rooms, and the arrangements connected therewith, should be conducted and carried on in an orderly manner, and that the charges should be fixed by a tariff, or schedule of prices, to be approved by the chairman and two directors of the Company. That the rooms should at all times, when required for the accommodation of the passengers by the said railway, be kept properly lighted and warmed, and accessible to the passengers by the railway, and to the servants of the Company, for all purposes connected with the business of the railway, but not otherwise. That the plaintiffs would keep the premises in repair, and would not carry on therein any other trade or business, nor do anything to annoy, &c., the defendants, or the passengers travelling by the railway, or obstruct the passage thereof or the traffic thereon, and would also insure the premises.

That the defendants by the said indenture covenanted for quiet enjoyment of the premises by the plaintiffs; and that no refreshment-rooms other than those to be erected by the plaintiffs, and those at the termini at Bristol and Paddington, or certain other terminal or intermediate stations, for the convenience of passengers joining or leaving trains at such stations, should be erected on the Great Western Railway, or by the said defendants; and that, in case the Swindon station should, during the continuance of the said lease, be disused as the regular and general

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place of stoppage for the purpose of refreshment of passengers, the defendants should purchase of the plaintiff the whole of the buildings on the said station at the full amount of the cost and expenditure in respect thereof, in case such disuse should take place within five years from the date of the indenture, but if afterwards, then at a fair price, to be fixed by arbitration, the defendants also making compensation for the loss of future profits.

And it was by the said indenture declared to be the intention of the defendants, and the understanding of the plaintiffs, that, in consequence of the outlay to be incurred by them in erecting the said refreshment-rooms at Swindon, and preparing such other works as aforesaid, the defendants should give every facility to the plaintiffs for enabling them to obtain an adequate return, by means of the rents and profits to be derived from the said refreshment-rooms; and that all trains carrying passengers, not being goods trains, or trains to be sent express or for special purposes, and except trains not under the control of the defendants, which should pass the Swindon station either up or down, should, save in case of emergency or unusual delay arising from accident, stop there for refreshment of passengers for a reasonable period of about ten minutes; and that, as far as the defendants could influence them, the same trains not under their control should be induced to stop for the like purpose. And the defendants did, by the said indenture, covenant and engage with the plaintiffs not to do any act which should have an effect contrary to the above intention, as by the said indenture reference &c. The declaration then averred an entry on the premises, and general performance of their covenant by the plaintiffs. Nevertheless, the plaintiffs in fact said that the defendants, not regarding the said indenture, nor the said covenant by them in that behalf made as aforesaid after the making of the said indenture, and during the said term thereby granted, and after the said refresh

ment-rooms, &c., were so completed, finished, and fitted up as aforesaid, and whilst the said refreshment-rooms were open and supplied with provisions, according to the tenour and effect, true intent and meaning of the said indenture, and whilst the said Swindon Station continued to be used by the said defendants as the regular and general place of stoppage for the purpose of refreshment of passengers travelling by and upon the said railway of the said defendants, as in the said indenture mentioned, to wit, on the 12th of May, 1845, and on divers other days, &c., the defendants did divers acts which had an effect, and which were contrary to the intention of the said defendants in the said indenture in that behalf mentioned and expressed as aforesaid; that is to say, the said defendants did, on each of the several days and times last aforesaid, cause divers, to wit, five trains for carrying passengers, and each of which trains did carry divers, to wit, 500 passengers, the said trains being trains under the control of the defendants, and not being, nor any of them being goods trains, or trains sent express or for special purposes, according to the true intent and meaning of the said indenture, to pass the said Swindon Station as well up the said railway as down the said railway, without stopping there, to wit, at the said Swindon Station for the refreshment of passengers, for a reasonable period of about ten minutes; and each of which trains so carrying passengers as aforesaid, did, respectively, on the several days and times last aforesaid, by and through the directions and orders of the defendants, pass the said Swindon Station upon the said railway of the defendants, as well up the said railway as down the said railway without stopping there, to wit, at the said Swindon Station, for the refreshment of passengers, for a reasonable period of about ten minutes, or for any other reasonable period of time in that behalf, contrary to the tenour and effect, true intent and meaning of the said indenture; the said trains not being, nor any of them being prevented

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from so stopping by any case of emergency or unusual delay arising from accident; and the said defendants, on the several days and times last aforesaid, did cause the said several trains of them the said defendants, so carrying passengers as aforesaid, to stop, and the said several trains, respectively, did, by and through the directions and orders of the said defendants, stop at the said Swindon Station for a short and unreasonable period of time, to wit, for a period of one minute and no more, the said period of time for which the said trains so stopped not being sufficient to enable the passengers carried by the said trains, or any of them, to obtain any refreshment in or from the said refreshment-rooms, and the said trains not being prevented from stopping for a reasonable period of about ten minutes by any case of emergency or unusual delay arising from accident, contrary to the tenour and effect, true intent and meaning of the said indenture, and of the said covenant of the defendants; and so the plaintiffs, in fact, say, that the said defendants, although often requested so to do, have not kept the said covenants so by them made as aforesaid, but have broken the same, and to keep the same with the plaintiffs have hitherto wholly neglected and refused, and still do neglect and refuse, to the damage of the plaintiff of £10,000, &c.

The defendants set out the indenture on oyer, and demurred generally to the declaration. Joinder in demurrer.

The point marked for argument was, that the declaration did not disclose the breach of any covenant in the indenture, and was insufficient in law (a).

(a) In the other action the defendants pleaded:—

1st. Non est factum.

2nd. That, before and at the time of the committing of the said supposed breach of covenant, to wit, on the said 12th of May,

1845, a certain class or kind of train, for the carriage of passengers upon the said railway, had commenced to run and travel periodically, and has thence hitherto so continued to run and travel, and thence hitherto has been and still is

Sir T. Wilde, (*Cowling* with him), in support of the demurrer.—First, there is no covenant broken here. The indenture in question, after setting out the usual cove-

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published and announced to the public, and intended so to run and travel, that is to say, a class or kind of train running and travelling at a much quicker rate and speed than the ordinary and other trains running and travelling on and by the said railway, and performing the whole journey between the said termini, or ends of the said railway at Bristol and Paddington, and every part thereof respectively, in a much less space of time than the ordinary and other trains running, and not stopping for the purpose of, and not allowing time for the refreshment of the travellers thereon or thereby, during the said journey, or any part thereof; and that the said several trains in the said supposed breach of covenant were, and each of them was, trains or a train of and belonging to the said class or kind in this plea aforesaid, and that, during all the time from and after the said class or kind of train so commenced to run as aforesaid, the said Swindon Station has been and is disused as the regular or general place, or as any place of stoppage for the purpose of the refreshment of passengers travelling on and by the said class or kind of train.—Verification.

3rd. That each of the said trains so supposed to have passed the said Swindon Station, without stopping there for the refreshment of passengers for a reasonable period, as therein alleged, was a train sent express, within and according to the

true intent and meaning of the said indenture, and of this the defendants put themselves upon the country, &c.

4th. That each of the said trains so supposed to have passed the said Swindon Station without stopping there for the refreshment of passengers for a reasonable period, as therein alleged, was a train sent for special purposes, within and according to the true intent and meaning of the said indenture, and of this the defendants put themselves upon the country, &c.

5th. That each of the said occasions in the said breach mentioned, was a case of emergency within and according to the true intent and meaning of the said indenture, and of this the defendants put themselves upon the country, &c.

Replication, joining issue on all the pleas but the 2nd; and as to the 2nd, "That the Swindon Station had not, at any time before the committing by the defendants of the breach of covenant above assigned, been disused as the regular and general place of stoppage for the purpose of the refreshment of the passengers travelling in and by the said class or kind of train in that plea mentioned;" on which also issue was joined.

The case came on for trial at the Middlesex sittings after Michaelmas Term, 16th December, 1845, before *Pollock*, C. B., when the jury found a verdict for the plaintiffs on all the issues.

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nants by the plaintiffs, and that no business shall be carried on but that of refreshment-rooms, then contains covenants on the part of the defendants for quiet enjoyment, that no other refreshment-rooms shall be erected except at Swindon or the terminal stations, and that, in case the Swindon Station shall be disused as a general place of stoppage, the defendants shall make compensation. Then follows the declaration of intention on which this action is brought, that the defendants should give every facility to the plaintiffs for enabling them to obtain an adequate return for their outlay, by causing all trains carrying passengers, with certain exceptions, to stop a reasonable time at Swindon. It is material to observe, that, though the declaration uses the word "covenant" in the indenture as set out on over, the plaintiffs, who in all other covenants use formal words of covenant, here say they "*engage* not to do any act which should have any effect contrary to the above intention." It is not contended that technical words are necessary to constitute a covenant, or that the word "*engage*" would not be sufficient to express a binding contract; but the importance of the variation in the language is to interpret the real intention and effect of the words used by the parties.

Now, it is obvious that the deed contemplated the possibility of the Swindon Station being disused to some extent, as it reserves a power of permitting the erection of refreshment-rooms for the convenience of parties joining or leaving the trains at certain stations, and under various circumstances, which might entirely defeat the object of the lease. That object appears to be to give an adequate return for the expenses of building the premises. There is no covenant by the plaintiffs to provide refreshments, nor is there any allegation in the declaration that any passenger required, or gave notice that he required, or would have taken refreshment, or whether there were any parties to supply them. If, by the course of improvement, a train, instead of taking such a number of hours as would rea-

sonably create a necessity for refreshment, should go so rapidly that nobody should require refreshment, the knowledge of their own interests would cause the plaintiffs to dispense with the attendance of persons to provide refreshments under circumstances where none would be required. The trains complained of are the rapid trains, which go from London to Exeter in four and a half hours, so that Swindon is within less than an hour of Bristol, and something more than an hour from London; no refreshment, therefore, can be required.

Secondly, supposing these words to amount to a covenant, and that such covenant is broken, the breach is not well assigned of any covenant contained in the deed. It is material to observe how the breach is alleged in this case,—not as a breach of the covenant to stop at Swindon, but of the covenant to do no act to defeat the intention to stop. The intention never could have been that the trains should stop if the passengers did not require it, still less that the defendants should bind themselves that every train should stop absolutely for ninety-nine years. If subsequent circumstances render it inexpedient to execute an intention, that is not doing an act to defeat the intention. Looking at the consideration and nature of the covenant, the peculiar framing of the deed, particularly that part of it which contemplates that Swindon may cease to be the general stopping place, and provides a particular mode of compensation for that event, the construction sought to be put upon this covenant is utterly inconsistent. What was meant to be provided against was, that the defendants would not do any collateral or evasive act which should have the effect of counteracting the intention of the lease. You cannot do anything contrary to an intention which no longer exists. A public Company, established under an act of Parliament, with power to interfere with private rights of all kinds, has a duty to perform to the public that they shall be conveyed as speedily as possible, which is not to be controlled by the private interests of the plaintiffs.

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Watson (with whom were *Martin* and *Fitzherbert*) was not called upon by the Court.

PARKE, B.—The questions in this case are, whether in this deed there is a covenant on the part of the Company; secondly, whether the declaration assigns a good breach of that covenant. I am of opinion that there is a covenant, and that the declaration assigns a good breach of it.

With respect to what in law is a covenant, Sir *T. Wilde* has rightly and properly admitted that no technical words are necessary to constitute a covenant; whatever words you find which clearly shew the parties oblige themselves to do an act, those amount to a covenant in point of law. Then the question is, whether in this particular covenant the Company have obliged themselves to do a particular thing or not to do a particular thing, and what the nature of that obligation is.

Now, this instrument certainly in this part of it, though in the other it appears to be very correctly and properly drawn, is very inartificially framed. The part of the instrument which is said to amount to a covenant is this:—
“And it is hereby declared to be the intention of the said defendants, and the understanding of the said plaintiffs, that, in consequence of the outlay to be incurred by them in erecting the said refreshment-rooms at Swindon, and preparing such other works as aforesaid, the defendants should give every facility to the said plaintiffs for enabling them to obtain an adequate return by means of the rents and profits to be derived from the said refreshment-rooms, and that all trains carrying passengers, not being goods trains, or trains to be sent express or for special purposes, and except trains not under the control of the said defendants, which should pass the Swindon Station, either up or down, should, save in case of emergency or unusual delay arising from accident, stop there for the refreshment of passengers for a reasonable period of about ten minutes, and that, as far as the defendants could influence the same

trains not under their control should be induced to stop for the like purpose."

Now, I admit, if the instrument contained no other words, there might have been some question whether there was anything more than a declaration of an intention on the part of the Company that this should be done. In some cases the word "intention" is quite enough to create a covenant. There are cases in the books of a declaration by parties of an intention to levy a fine, which amounts to a covenant to levy a fine. But the particular part of the indenture does not stop there, for there is an express covenant on the part of the Company to do something; the Company "engage" (which is exactly the same as if they had said "covenant") not to do any act which should have an effect contrary to the above intention; therefore they are not to do anything which shall have the effect of causing the trains carrying passengers not to stop there for a reasonable period for refreshment. That is the effect of this covenant taken by itself, and the result is, that the Company have not covenanted absolutely that all the trains shall stop, or they would be liable in case the trains did not stop in consequence of some act of third parties, or they would certainly be liable if their own servants, though unintentionally, carried them on; but the Company protect themselves from that liability, and the engagement on their part is, that they will do nothing to cause the trains not to stop at the appointed place, and wait the proper time.

Then it is alleged that this covenant is at variance with the other covenants in the indenture, by which the Company bind themselves, in case at any time Swindon should not be the general place of stoppage for refreshment, to purchase the Swindon Station, if it occurs within five years, at the price the plaintiffs shall have laid out upon it, and, if it shall occur afterwards, at a price to be agreed upon by arbitration; and there is at first sight an apparent incongruity between these two covenants; but it is our duty

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to read this indenture so as to give every part of it effect if we can, and I think we may do so by construing this which the plaintiffs say is the covenant upon which the action is brought, to mean, that this is to take place so long as the Company choose to make Swindon the general place of stoppage for refreshment. This covenant, therefore, does not oblige the Company to cause all the trains, or any particular trains to stop there, if they have made up their minds that Swindon shall cease to be the station for all the trains to stop at; but so long as they make Swindon the general place of stoppage for refreshment, then they are obliged to stop every train there, unless they come within the particular exceptions specified in the other parts. So construing this covenant, therefore, we make both of these parts consistent.

Then, to allege a proper breach of this covenant, the plaintiff should shew in the declaration that the act of the Company in stopping the trains took place while Swindon was continued as the general place of refreshment, and that particularly averred; therefore there is a breach assigned of this covenant, and it appears to me there is a good breach assigned of the covenant by alleging that the Company actually caused the trains not to stop at that particular station.

Then it is said there is no breach unless it is shewn that there were some persons in the train desirous to have refreshment. I think this is a matter which does not prevent a breach being shewn, and that the train should stop and the passengers are afterwards to consider whether they will have refreshment or not. It cannot be meant that the train is only to stop in case the passengers want food and give notice of it; that would be a very inconvenient arrangement indeed. It seems to me the covenant is an absolute covenant that they shall stop ten minutes for the purpose of enabling the passengers to have refreshment if they choose to have it. It appears to me, therefore, upon the true construction of this instrument there is a binding

obligation upon the Company, to the effect I have mentioned; and it seems to me, also, the declaration is perfectly sufficient, and a good breach is assigned of this covenant.

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ALDERSON, B.—I am of the same opinion. The true construction of this instrument has been very fully gone into by my Brother *Parke*. It seems to me the intention of the covenant was, that all the trains should stop so long as Swindon was the general place of stoppage; that is to say, if the great bulk of the trains were to stop there, every one, except express or special trains, was to stop. We are not concerned to determine whether the trains which passed were express or special trains; for they are averred in the declaration not to be so; and, if that be so, the parties are not bound to stop only for the purpose of ascertaining whether the passengers wish to have refreshment, or when the passengers express their own desire to stop.

I think the meaning of the covenant is, that the parties have undertaken to stop the trains in order to the temptation, so to speak, to the passengers to take refreshment. As to the disuser, so soon as they disused Swindon as the general place of refreshment, then they would be liable, under their covenant with Messrs. Rigby, either to buy them out at what they had expended, if before five years, or after five years by making a reasonable compensation.

ROLFE, B.—I am of the same opinion. The only observation I will add is this: Sir *T. Wilde* has pointed out that there may be circumstances in which it cannot be intended that the parties should be bound to have their trains stopped, namely, the case of their purchasing up, under the proviso, the interest of the plaintiffs in the Swindon Station. Now, I think my Brother *Parke* has reconciled that, by shewing, that, upon construing the two covenants, a qualified meaning is to be given to this covenant, but still it remains a covenant. If that, were not

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so, I do not at all follow Sir *T. Wilde* in saying it would have the effect of relieving the parties from the covenant. If my opinion had been only that the parties entered into an absolute covenant, they not contemplating the inconvenience when certain contingencies would arise to them of doing so, the covenant would still have remained.

PLATT, B.—I also think that the plaintiffs are bound to the judgment of the Court. It appears, at the execution of this deed, a declaration of the parties entered into it is made, and by that declaration they must understand what they mean to covenant when they use the word “intention.” And what is to be the meaning of the contract which they both enter? “And it is hereby declared the intention of the said defendants, and the understanding of the said plaintiffs, that, in consequence of the expense to be incurred by them in erecting the said refreshment-rooms at Swindon, and preparing such other works as aforesaid, the defendants should give every facility to the said plaintiffs for enabling them to obtain an adequate return by means of the rents and profits to be derived from the said refreshment-rooms, and that all trains carrying passengers, not being goods trains, or trains to be sent out for special purposes, and except trains not under the control of the said defendants, which should pass Swindon Station, either up or down, should, save in case of emergency or unusual delay arising from accident, stop there for refreshment of passengers.”

Now, that is the intention of the contract, because the word “intention” is not what passes in the mind of a man at the moment which may be changed after the event; the word “intention” means the intention of the contracting parties at the time, and the intention is transferred to the contract itself, which was the same as it is now. The intention is, that all trains carrying passengers, with certain exceptions, shall stop there for refreshment of passengers for the reasonable time

minutes; and then the Company go on to engage not to do any act which shall have an effect contrary to the above intention, that is, contrary to the meaning of the said contract; and, surely, to compel the trains, or any of them, to pass by the station after that, is doing an act contrary to the intention of the contract, and contrary to the meaning of the covenant.

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I think that part of the deed has been very properly introduced in order to meet an intermediate case, between the entire disuser of this place as a general refreshment-room and a partial infringement of the use of it; anything that would amount to a disuser would enable the parties who are the plaintiffs here to demand the value of the buildings and the other advantages which are pointed out by the deed; but anything short of that was meant, as it seems to me, to be met by this covenant. I therefore think this is a perfectly intelligible covenant on the part of the Company; that it has been infringed; and that the infringement is properly stated upon the record—in doing the act, namely, of sending carriages past the station, instead of stopping for ten minutes.

Judgment for the plaintiffs.

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COURT OF CHANCERY.

BEFORE V. C. OF ENGLAND.

Feb. 13th.

Re THE MANCHESTER, HUDDERSFIELD, AND
GRIMSBY RAILWAY COMPANY.

Where, by the prayer of a petition, the required parliamentary deposit of a Railway Company is sought to be invested in Exchequer bills, the Court will give the parties liberty to lay out the same in any of the parliamentary stocks appointed by the Accountant-General, or in Exchequer bills from time to time, as may be most convenient to the parties.

MR. K. PARKER presented a petition on behalf of the directors of the Railway Company, praying the issue of a sum of £52,688, the amount of the required parliamentary deposit, in Exchequer bills.

The VICE-CHANCELLOR, in making the order, it had better be drawn up in a form, which had been most convenient to parties, viz., that the money be laid out in either of the three parliamentary stocks appointed by the Accountant-General for that purpose, or in Exchequer bills from time to time, as the parties might think fit.—It might be a very desirable thing to lay out the money of Railway Companies in Exchequer bills from time to time, as it was evident that there could not be a sufficient quantity of Exchequer bills obtained at one moment for the payment of the enormous sums of money which were paid into Court.

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IN CHANCERY.

BEFORE V. C. KNIGHT BRUCE.

JACQUES v. CHAMBERS.

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THE bill in this case was filed on behalf of the infant children of F. Jacques and Ann his wife, in order to obtain a declaration of their rights to a legacy of railway shares given by the will of their grandfather, dated the 2nd February, 1845. By this will the testator appointed H. Chambers and S. B. Adams his executors, and gave to them, their executors, administrators, and assigns, thirty whole shares in the Great Western Railway Company, upon trust during the joint lives of his son, F. Jacques, and Ann his wife, to pay the interest or dividends thereof for the separate use of Ann J., without power of anticipation, and after the death of F. J., to pay the same to A. J. for her life, and after her death, to divide the shares between her children in manner in the said will mentioned. The testator, after giving another legacy of thirty Great Western Railway Shares, gave the rest, residue, and remainder, which should remain, (after satisfying the devises and bequests given by his will, and his debts, funeral and testamentary expenses), of his real and personal estate and effects, of or to which he should be possessed or entitled, to John Jacques and F. Jacques, as tenants in common.

A testator, who at the time of his death was possessed of fifty original and seventy purchased shares in a railway, in respect of which all the calls had not been made, by his will gave thirty whole shares in the said railway to trustees, for the benefit of a married woman for life, without power of anticipation, and thirty shares to B.; and he declared that the legacies should not be held to be specific, so as to be capable of ademption. By a resolution of the railway company, new quarter shares were raised and offered rateably

to the registered proprietors. Sixty new shares were offered to and accepted by the executors, and the deposit thereon was paid by them:—*Held*, that the bequests were specific, and that the income of the shares from the time of the testator's death belonged to the legatees.

That the legatees were entitled to so many of the new shares as had been allotted in respect of the whole shares bequeathed to them, subject to the payment of the future calls.

That the testator's estate was not liable to pay the calls on the whole shares purchased by the testator.

That, where a testator dies possessed of several articles of the same nature, the legatee of some of them has the power of selecting, and not the executors of appropriating, those which he shall take.

Whether testator's estate is liable for future calls on the shares originally subscribed for—*Quere.*

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And the will contained a declaration, that “the legacies railway shares thereinbefore given should not be deemed specific, so as to be capable of ademption; and that, if should not have a sufficient quantity of such shares at the time of his decease to answer the said legacies, the deficiency should be raised out of his estate for the benefit of the legatees thereof respectively.”

The testator died shortly after the date of his will, being at the time of his death possessed of 120 Great Western Railway shares; for fifty of which he was an original subscriber, and in respect of which he had signed the Parliamentary contract entered into by the subscribers to the Great Western Railway undertaking, dated the 17th January, 1835; by this deed it was, amongst other things, witnessed, that the several persons parties thereto respectively or their respective heirs, executors, administrators, or assigns, should well and truly pay, or cause to be paid, the amount subscribed by each of them respectively, within ten years from the date thereof, in such sums and at such places and times, as, until the passing of the said acts of Parliament, should be required by the said directors for the time being engaged in conducting the said undertaking, and after the passing of such act or acts, as the directors or directors authorised by the said act or acts should direct to appoint.

By a resolution, passed at the twentieth half-yearly general meeting of the Great Western Railway Company on the 14th of August, 1845, it was resolved, in pursuance of the powers granted to the company by act of Parliament, to raise an additional capital of £2,325,000 by the creation of distinct and integral shares of the amount of £25 each, to be offered rateably to each proprietor who might be registered upon the books of the company, on Saturday, the 6th of September then next, two such quarter shares being assigned in respect of every £100 share or five £20 shares, and one quarter share in respect of ev

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£50 share, 2*l.* 10*s.* to be paid on each quarter share on the 8th of October then next; and in case the whole number of such shares were not accepted, and the deposit paid thereon within one month after the offer should have been made, the directors were authorised to appropriate or dispose of the remainder in such manner as they might consider best for the benefit of the company.

In pursuance of the said resolution, sixty new shares were offered to the executors in respect of the thirty shares first bequeathed by the will; and, as the new shares were at a premium, they paid £150, the amount of the deposit thereon, although it appeared that they had not any funds in their hands applicable to the payment of the legacy duty, or of the deposit on the quarter shares, or any calls which might be thereafter made in respect of such new shares.

The bill prayed, that the trusts of the will might be carried out under the direction of the Court, and that proper directions might be given for paying the said sum of £150 and further calls, or for a reference to inquire in what manner the same ought respectively to be raised and paid, &c.

The executors, by their answer, admitted that they had assented to the legacy, and that they then held thirty whole shares upon the trusts declared by the will, but that no particular shares had been set apart to answer the said legacy.

Mr. Russell and *Mr. Selwyn*, for the plaintiffs.

Mr. Rolt, for *Mr.* and *Mrs. Jacques*.

Mr. Wigram and *Mr. Nevinson*, for the residuary legatees.

Mr. Stinton, for the executors.

The first questions raised were, whether the legacy to

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F. J. and Ann, his wife, was specific, so as to entitle the legatees to the produce of the shares from the day of the death of the testator; secondly, whether the legatees were entitled to the new quarter shares; and, thirdly, whether the deposits paid by the executors on the quarter shares, and the future calls thereon, were to be paid out of the testator's assets.

The VICE-CHANCELLOR.—As the testator had, at the date of his will, more than the specified number of whole shares standing in his name, and which remained standing in his name until his death, my impression is, on the plain construction of this will, that the bequest must be considered as specific, and that the income, therefore, will follow the shares. I think it plain, also, that the accretions belong to the shares, subject to the question, whether the parties will have a reference to the Master to inquire whether it will be for the benefit of the infant that the quarter shares should be taken. I think that those who take the accretions must take them *cum onere*, and must pay all future calls thereon.

Besides the foregoing, other questions were raised, first, whether, as all the calls on the whole shares had not been paid up, the testator's estate was liable to pay the future calls on such of the shares as should be appropriated in respect of the legacy; secondly, whether, in considering the first question, the Court would make any distinction between the original and the subscribed shares; and thirdly, whether the legatees or the executors had the power of selecting out of which class the shares to be appropriated in respect of the legacies should come. His Honor declined to come to any decision on these points until he had seen the parliamentary contract.

The counsel for the plaintiffs contended, that the estate of the testator was liable to all future calls on the shares, as well original as those subsequently purchased; *Blount v. Hipkins* (a), *Fyler v. Fyler* (b); and that the legatees had, at all events, the power of selecting out of what shares their legacy should come: see *Swinburne on Wills*, p. 924, (ed., 1803). It was contended on the other side, that this case differed from the case of *Blount v. Hipkins*, inasmuch as The Great Western Railway Act passed in the lifetime of the testator, whereas, in the first case cited, it did not pass until after the testator's death. That the right of appropriating the shares was in the executors.

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The *Vice-Chancellor* held, that the testator's estate was not liable to pay the calls on the purchased shares; but as he did not see any difference between this case and that of *Blount v. Hipkins*, he declined, in the face of the decision in that case, to decide the point as to the liability of the testator's estate to the calls on the original shares. As to the point of the right of selection, his Honor held that that right was in the legatees.

The minutes of the decree were as follow :—

DECLARE, that the legacies to Mr. and Mrs. Jacques were specific; that they were entitled to twenty-five out of the fifty shares originally subscribed for, (the other legatees taking the remaining twenty-five original shares); that the legatees were liable to pay the calls made and to be made, after the testator's death, on the shares purchased by him, and also on the quarter shares; and it was referred to the Master to inquire as to the best way of raising the money necessary for the calls.

The question as to the liability of the testator's estate to pay the other calls, to stand over until the decision of the *Lord Chancellor* on a petition of re-hearing.

(a) 7 Sim. 43; S. C. 13 Law J. Reports (N. S.) Chan. 13.

(b) Ante, Vol. 2, p. 813.

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BEFORE V. C. WIGRAM.

Feb. 25th. **FOOKS v. THE WILTS, SOMERSET, AND WEYMOUTH RAILWAY COMPANY.**

A Railway Company entered upon land and drew a trig line along it, without the consent of, and without having given any notice to the owner, whereupon he filed his bill and applied for an injunction. The Company having stated that they entered upon the land solely for the purpose of making a survey, and that they did not intend to proceed any further without giving the requisite notices, the Court refused to make any order on the motion, but reserved the costs.

THE plaintiff in this case was the owner and occupier of part of "The Park" in the parish or borough of Melcombe Regis, in the county of Dorset, in which a branch railway from the Wilts, Somerset, and Weymouth Railway was intended to terminate; and from his affidavit it appeared that the defendants, without having at any time given to the plaintiff any notice of their intention to take his land or any part of it, or that they were willing to treat for the purchase of the same, or that they intended to summon a jury to assess the value thereof, and without tendering any money as the price thereof, entered upon the land and removed the surface in a line extending upwards of one hundred yards, and nearly through the whole length thereof, and dug a ditch throughout that distance.

The plaintiff first became aware of the proceedings of the Company on the 3rd of February, 1846, and on the 12th of the same month filed his bill, praying that the said Company, &c. might be restrained by injunction from entering upon, taking possession, using, digging, or excavating his land, or any part thereof, (except for the purpose of surveying or taking levels of the land, or of probing or boring to ascertain the nature of the soil or of setting out the line of the works, after giving to the plaintiff three days notice thereof), until they should have given notice to the plaintiff of their intention to take such land, and should have offered to treat for the same, and until the price of purchase-money or compensation for the same should have been agreed upon or otherwise settled or assessed, and until such purchase-money should have been paid

deposited according to the provisions of the Act, (8th Vict. c. 18) (a).

This was an application for an injunction in the terms of the prayer of the bill.

The defendants, by their affidavits, stated, that they had entered on the plaintiff's land for the purpose of surveying and taking levels only, and that a trig line of two inches deep and fourteen wide was dug for the purpose of marking the centre of the line of railway; that the earth was only displaced for that purpose, but was not removed from the land, and only thrown alongside the trig line, and there left; that the defendants had done nothing but what was usual and absolutely necessary for the purpose of surveying and taking levels, and that they had no intention of again entering upon such piece of land, in order permanently to use the same for the purpose of their act, until they should have either paid to every party having any interest in such piece of land, or deposited in the Bank, in the manner provided by the act of the 8 Vict. c. 18 (a), the purchase-money or compensation agreed or awarded to be paid to the parties entitled thereto.

Mr. Romilly and Mr. Hare, in support of the motion.—The plaintiff's right to this injunction is founded on the fact, that the Railway Company have not acted in accordance with the provisions of the 8 Vict. c. 18 (a). By the 84th section of that act (b), they were bound to give not less than

(a) The Lands Clauses Consolidation Act.

(b) Sect. 84. "The promoters of the undertaking shall not, except by consent of the owners and occupiers, enter upon any lands which shall be required to be purchased or permanently used for the purposes and under the powers of this or the special act, until they shall either have

paid to every party having any interest in such lands, or deposited in the Bank, in the manner herein mentioned, the purchase-money or compensation agreed or awarded to be paid to such parties respectively for their respective interest therein; Provided always, that, for the purpose merely of surveying or taking levels of such lands, and of probing

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three days' notice before entering on lands; but this they have not done, and the defendants may, if not restrained by this Court, proceed to acts of more consequence, without giving the plaintiff notice.

It is stated by the affidavits that the Company do not intend to proceed further, and that the injury is trifling: however that may be, if it is shewn that the Company are exceeding their powers, the plaintiff is entitled to his injunction: *The River Dun Navigation Company v. The North Midland Railway (a)*.

Mr. *Wood* and Mr. *Osborne*, for the Company.—The Company do not intend to take any further steps without giving notice, and therefore the injunction would be unnecessary and useless: they had never had any notice and had never received any communication from the plaintiff, or they would have satisfied him with respect to what they had done.

The VICE-CHANCELLOR.—The Company ought to have pursued the course which the act prescribed, and which the plaintiff had a right to require should be taken for his protection. What has been already done by the defendants will, if they continue to act in the same manner, be a material question for consideration; but, as the defendants have stated that they do not intend to proceed any further without giving the required notice, I think the right course to pursue will be to make no order on the present motion, and to reserve the costs.

or boring to ascertain the nature of the soil, and of setting out the line of the works, it shall be lawful for the promoters of the undertaking, after giving not less than three, nor more than fourteen days' notice to the owners or occupiers thereof, to

enter upon such lands without previous consent, making compensation for any damage thereby occasioned to the owners or occupiers thereof."

(c) Antè, Vol. 1, p. 135.

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BEFORE THE V. C. OF ENGLAND.

GREATHED v. THE SOUTH-WESTERN and THE SOUTHAMPTON AND DORCHESTER RAILWAY COMPANIES.

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THE bill in this case was filed, on the 21st of February, 1846, by E. H. Greathed, proprietor of ten shares in the Southampton and Dorchester Railway Company, on "behalf of himself and all other the shareholders of the said Company, except such as are defendants hereto and such as have contracted to sell their shares to the South-western Railway Company, their directors and agents, against the South-western Railway Company and the Southampton and Dorchester Railway Company;" and it stated (among other things) the incorporation of the Southampton and Dorchester Railway Company by an

The provisional committee of the Southampton and Dorchester Railway Company entered into an agreement with the Great Western Railway Company for granting them a lease of that line, but afterwards, with the sanction of the Board of Trade, and of the Great Western Railway

Company, rescinded their agreement with the last-mentioned Company, and entered into a similar one with the South-western Railway Company. At the time of this arrangement, it was agreed that the Great Western Railway Company should give up all interference with the Southampton and Dorchester line, and that the South-western Railway Company should subscribe for all the shares then unappropriated (6500, for which the South-western Railway Company subscribed), and that clauses should be inserted into the Southampton and Dorchester act, for combining the independence of that Company with a reasonable control over the manner of constructing the works by the South-western Railway Company.

Certain clauses were submitted, with the approbation of the South-western and the Southampton and Dorchester Companies, for insertion in the Southampton and Dorchester bill, limiting the amount to be subscribed for by the South-western Railway Company to £330,000, until an increase should be made in the capital, and giving the South-western Railway Company the appointment of four directors out of their own body; but these clauses were struck out by the Committee of the House of Commons, on an objection arising out of the standing orders. One of the shareholders in the Southampton and Dorchester Company filed a bill, on behalf of himself and all other the shareholders of the said Company, except such as were defendants thereto, and such as had contracted to sell shares to the South-western Railway Company, against the South-western Railway Company, and the Southampton and Dorchester Railway Company, alleging, that, in violation of the understanding between the parties, the South-western Railway Company had contracted to purchase such a number of the shares of the Southampton and Dorchester Railway, beyond the 6500 originally subscribed for, as would destroy the independence of that Company, and praying the interference of the Court.

Held, upon a demurrer for want of equity and for want of parties, 1st, that the Great Western Railway Company were necessary parties; 2ndly, that those shareholders in the Southampton and Dorchester Company who had agreed to sell their shares to the London and South-western Company were necessary parties; and, 3rdly, that the London and South-western Company were entitled under their agreement to 6600 shares, and not to 6500 only, as in the bill mentioned. Demurrer allowed, with liberty to amend.

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act (a), intituled, "An Act for making a Railway from Southampton to Dorchester, with a branch to the town of Poole," according to the provisions of the therein-recited acts, viz. "The Companies Clauses Consolidation Act (b)," "The Lands Clauses Consolidation Act (c)," and "The Railway Clauses Consolidation Act (d)." And by sect. 4, reciting that the estimated expense of making the railway with a single line of rails would be £500,000, it was enacted, that the capital of the Company should amount to that sum, provided that it should be lawful for the Board of Trade at any time to require a double line of rails to be laid down, in which case the capital might be increased by £180,000. And (by sect. 5) the capital was to be divided into shares of £50 each. And (by sect. 9) it was enacted that the number of directors should be twelve, of whom four should be directors for the time being of the London and South-western Railway Company, and that the qualification of each of the other eight should be the possession in his own right of ten shares in the undertaking. And (by sect. 10) it was enacted, that the directors appointed by that act should continue in office until the first ordinary meeting, to be held in 1846; and that at such meeting the shareholders present, personally or by proxy, should elect twelve directors, of whom four should be directors of the South-western Railway Company, indicated by the Court of directors for the time being of the said last-mentioned Company, &c.; provided that, if the Court of directors of the South-western Railway Company should fail to indicate the four members of their body to be appointed as thereinbefore mentioned, or if any of such four directors should refuse to act, the remaining directors to be appointed should have the same powers; and that all acts of such directors should be as valid as

(a) 8 & 9 Vict. c. xciii.

(b) 8th Vict. c. 16.

(c) Id., c. 18.

(d) Id., c. 20.

though such four directors had been duly elected, and consented to act; and (by sect. 24) that the railway should be formed of such gauge, and according to such mode of construction, as would admit of the same being worked continuously with the London and South-western Railway, and that the line of the railway at the junction with that Company's railway, and all the openings in the ledges or flanges as might be necessary or convenient for effecting such junction, should be made and effected under the direction and superintendence of the engineer of the South-western Railway Company. And (by sect. 57) it was enacted, that it should be lawful for the Company, by the directors thereof for the time being, to let or lease the railway and works thereby authorised to be made, or any part thereof, and that every contract or agreement entered into for such purpose, before the passing of that act, by the provisional directors of the Company should be as valid as if the same had been made subsequently to the passing of that act.

The bill then stated the incorporation of the South-western Railway Company by the 4 & 5 Will. 4, c. lxxxviii.; and that, by the 50th sect. of their amended act (*a*), they were empowered to make and enter into any contract or agreement with any other Railway Company, either for the division or apportionment of tolls or rates, or for the passage over or along the railway of any engines or carriages of or belonging to any other Railway Company, or for the passage of the South-western Railway Company's carriages over other lines, and also to make and enter into any other contract with any other Railway Company that might be deemed advisable; and that every such contract might contain such covenants, clauses, provisoes, conditions, and agreements, as the contracting parties might respectively think advisable, and mutually

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agree upon; and (by sect. 62) that the Court of directors for the time being should have full power and authority to purchase land, &c. for the use of the said undertaking, and generally to enter into and execute, and also to release, modify, alter, vary, and discharge any contract, agreement, &c.; and that all contracts in writing which should be signed by any five of the directors should be binding on the Company.

That, in 1844, the provisional committee of the Southampton and Dorchester Railway proposed the formation of the railway afterwards authorised to be made by the Southampton and Dorchester Railway Act, and the South-western Railway Company projected a line from Salisbury to Yeovil, passing near Stalybridge, with a branch to Dorchester, and connected with a line of railway in course of construction from the London and South-western Railway to Salisbury; and, the Board of Trade having approved the proposed line of railway from Southampton to Dorchester, and rejected the South-western scheme, the provisional committee of the Southampton and Dorchester, having failed in their endeavours to enter into any arrangement with the South-western Railway Company, entered into an agreement with the Great Western Company for granting a lease of the Southampton and Dorchester Railway to the last-mentioned Company, and shortly afterwards the South-western Railway Company abandoned their scheme, and projected three others,—one from Hook Pit to Salisbury, one other from Salisbury to Yeovil, through a different county, and the third from Salisbury to Dorchester, with a branch to Poole.

The Board of Trade having decided against the last-mentioned lines, under the sanction of that Board it was proposed, that the Great Western Railway Company should abandon their agreement for a lease in favour of the South-western Railway Company; but the provisional committee

f the Southampton and Dorchester Railway were apprehensive that the South-western Railway Company would, if allowed to have a controlling power in the direction of the company, alter the proposed line; and, to prevent their so doing, it was agreed, between the Great Western Railway Company, the South-western Railway Company, and the provisional committee of the Southampton and Dorchester Railway Company, that the last-mentioned Company should be so constituted as to be independent of the direct or indirect control of the South-western Railway Company, and that that Company should subscribe for such of the shares of the Southampton and Dorchester Railway Company as had not been subscribed for, and that they should grant a lease to the South-western Railway Company, according to the stipulations of an agreement which was entered into by the Great Western Railway Company, and South-western Railway Company, and the provisional committee of the Southampton and Dorchester Railway Company, dated the 14th of January, 1845, whereby it was agreed, that the basis of that arrangement should be an acquiescence on the part of the three Companies to the decision of the Board of Trade; and it was stated, that therein reference had been been made more especially to extension lines from Salisbury or Dorchester, competing with the Great Western, including its branches and the lines then sanctioned on the one hand, and to extension lines from Basingstoke, competing against the South-western Railway Company, including its branches and the coast line to Dorchester on the other; that the acquiescence of the South-western Railway Company was to be shewn by promptly withdrawing all lines promoted by them.

That a clause was to be inserted in the Southampton and Dorchester Bill, authorising its lease to the South-western Railway Company at a rent, of £20,000 per annum, with half the net profits exceeding the rent; and conditions were also to be inserted for combining the independence

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of the Southampton and Dorchester Company with a reasonable control over the manner of constructing the works by the approbation of the engineer of the South-western Railway Company being given to the contract before the same should be entered into; it being understood, that, if any difference arose, the Board of Trade should decide between the parties, and the Great Western Railway Company was at once to abandon all connexion with the Southampton and Dorchester line.

That, on the 21st of February, 1845, a sub-committee of the Southampton and Dorchester Railway Company had a conference with the Board of Directors of the London and South-western Railway Company, and that an agreement was signed by them as follows: "That the £325,000, or thereabout, about to be subscribed by the South-western Railway Company shall be held by that Company as a part of the capital of that Company until the expiration of two years from the opening of the line, and that during such period that Company shall nominate four of the twelve directors. That, after the expiration of that period, the South-western Railway Company shall be at liberty to sell by public auction, or tender, in such manner as shall be approved by the Directors of the Southampton and Dorchester Company, any part of the said shares, losing the nomination of one director for every £80,000 nominal amount of shares sold by them. That the four directors first named by the South-western Railway Company, viz. W. J. C., A. H., G. H., and T. S., shall be inserted on the committee on the bill."

That the solicitor of the South-western Railway Company drew up certain clauses, (carrying out the said agreement), which were intended to be inserted in the Southampton and Dorchester bill, one of which was, "That the South-western Railway Company may, and they are hereby empowered to subscribe towards and become shareholders in the undertaking hereby authorised, to any

extent not exceeding the sum of £380,000 (*a*), so long as the capital of the Company hereby incorporated shall not exceed £500,000; but, in the event of the said capital being at any time increased to the extent of £180,000, then and in such case it shall be lawful for the said South-western Railway Company to subscribe an additional sum, not exceeding £70,000, towards such increased capital;" and another was, "That the number of directors shall be twelve, of whom four shall be appointed by the direction of the South-western Railway Company out of their own body, in the event of their becoming shareholders to the extent of £380,000 (*a*) or to any increased extent, and the remainder by the shareholders in the Company, exclusive of the South-western Railway Company; and the qualification of a director, except those to be appointed by the South-western Railway Company, shall be the possession in his own right of ten shares in the undertaking."

That the committee of the House of Commons struck out these clauses as inconsistent with the standing orders of the House, no notice having been given of the lease intended to be granted to the South-western Railway Company.

That a lease was granted in pursuance of the agreement of the 16th January, 1845.

That the plaintiff was a subscriber for ten shares, and entitled to ten votes in the election of directors; and that the South-western Railway Company had subscribed for 6,500 shares, and the railway was in a course of making.

That, by an act of Parliament (*b*), intituled "An Act to amend the Acts relating to the London and South-western Railway, and to authorise the London and South-western Railway Company to buy, and the Guildford Junction

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(*a*) The votes in respect of £330,000 would be 6600. See prayer of bill, post, p. 221.

(*b*) 8 & 9 Vict. c. clxxxv.

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Railway Company to sell, the Guildford Junction Railway;" the South-western Railway Company were authorised, with the consent of a special general meeting, subscribe towards, and to become shareholders in, the Southampton and Dorchester Railway Company, upon such terms and conditions as might be agreed upon by them, to any extent not exceeding £400,000.

That, under the agreement with the Southampton and Dorchester Railway Company, the South-western Railway Company were entitled to hold 6500 shares, and no more, and to give, in the election of eight directors, (not directors of the South-western Railway), 668 votes in respect of those shares, and no more.

That no scale of voting was prescribed by the Southampton and Dorchester Railway Act, but by the Companies Clauses Consolidation Act (a) it was enacted, that, where no scale should be prescribed, every shareholder should have one vote for every share up to ten, one additional vote for every five shares after the first ten up to 100, and an additional vote for every ten votes after the first 100 on payment of all calls.

That, in January, 1845, there were 120 subscribers to the Southampton and Dorchester Railway other than the South-western Railway Company, who had a right to give, in the election of eight directors, 1560 votes, which were sufficient to insure the independence of the Southampton and Dorchester Company.

That, in violation of their agreement, the South-western Railway Company had, by their directors or agents, contracted to purchase upwards of 2500 shares of the Southampton and Dorchester Railway Company, which, together with the 6500 already subscribed for by them, would enable the South-western Railway Company, by the use of the votes in respect of such shares, or even by

(a) 8th Vict. c. 16, s. 75.

abstaining from the use of such votes, to cause such directors only to be elected as they might desire.

That they purchased such shares, not for the purpose of deriving the legitimate profit thereof, but for the purpose of preventing the Southampton and Dorchester Railway Company from opposing a newly projected railway from Salisbury to Yeovil. The bill prayed, "that it may be declared that the defendants, the South-western Railway Company, are not entitled, until the capital of the Southampton and Dorchester Railway Company shall have been increased beyond £500,000, to vote in the election of eight directors of the Southampton and Dorchester Railway Company (other than the four directors of such last-mentioned company to be selected from the South-western Railway Company) in respect of any greater number than 6500 shares of the Southampton and Dorchester Railway Company; and that the South-western Railway Company are not entitled, until such increase of capital, or the shares beyond 6500, purchased and contracted to be purchased by them, shall have been sold or transferred, to give any greater number of votes in the election of such directors than such due proportion of votes with respect to the votes which the holders of so many of the remaining 3500 shares as have not been purchased or contracted to be purchased by or on account of the South-western Railway Company are entitled to give, as the votes in respect of such 6500 shares held by the South-western Railway Company would have borne to the votes which the holders of the remaining 3500 shares would have been entitled to give, had the South-western Railway Company abstained from purchasing or contracting for the purchase of any of such 3500 shares; and that the South-western Railway Company may be decreed to sell and dispose of, to some persons or person other than the South-western Railway Company, or any person in trust for them, or otherwise to transfer to plaintiff, or as he may direct, for the be-

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nefit of himself and those on whose behalf he sues, or such and so many of them as will claim the benefit of such transfer, all shares in the Southampton and Dorchester Railway Company which they, or any, or either of them have purchased, or caused to be purchased, or contracted to purchase, in their own names or name, or in the names or name of any other persons or person plaintiff thereby submitting to pay the South-western Railway Company the amount which they have paid and contracted to pay for such shares, and to complete all such of the said contracts for shares as remained unperformed, so that the independence of the Southampton and Dorchester Railway Company from the control of the London and South-western Railway Company may be maintained; and that in the meanwhile the South-western Railway Company, their officers and treasurer, may be restrained by injunction from applying for, or requiring the registration of the transfer or assignment of any share or shares purchased by the South-western Railway Company, or any person or persons in trust for them, or any or either of them, and from voting or offering any vote or votes in the election of any directors or director of the Southampton and Dorchester Railway Company, other than the four who were the directors of the South-western Railway Company on the 28th of February, 1846, or at any other time in respect of any share or shares in the Southampton and Dorchester Railway Company, purchased or contracted to be purchased by or in trust for the South-western Railway Company, other than the 6500 shares, and from giving or offering in such election any number of votes in respect of the 6500 shares, beyond the same proportion with regard to the number of shares which have not been purchased by or in trust for the South-western Railway Company, as the London and South-western Railway Company will, in respect of the said 6500 shares, have been, at the time of the first making up and sealing of the

register of shareholders in said Southampton and Dorchester Railway Company, on the 20th August, 1845, entitled to give in proportion to the number of votes which the holders of the remaining 3500 shares would then have been entitled to give, had an election of directors of the said Southampton and Dorchester Railway Company been in progress."

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The defendants, the South Western Railway Company, put in a general demurrer to the bill for want of equity, and also for want of parties, inasmuch as the shareholders who had sold or contracted to sell their shares to the South-western Railway Company, had not been made parties.

Mr. *Stewart* and Mr. *Beales*, in support of the demurrer.—The plaintiff in this suit endeavours to separate his interest from the other shareholders who have consented to sell, and in the absence of those parties attempts to prevent them from getting the benefit of the sale to the Company, and of transferring their liabilities, which, under the act, they are entitled to do. The South-western Railway Company, a responsible body, have purchased the shares of those who were willing to sell, and in their absence this bill seeks to substitute some one else in their place, without regard to the question whether the shareholders are or are not willing to sell to such parties.

The agreement on which the plaintiffs found their claim was made between three parties, but one of them, the Great Western Railway Company, is not before the Court.

The relief sought is in direct opposition to the Companies Consolidation Act; for, by that act, if any one have shares, he has, by virtue of those shares, a right to vote. The independence mentioned in the agreement refers only to the manner of completing the works. There is no agreement which, on the face of it, prevents the South-western Railway Company from purchasing shares; and there is nothing in any one of the agreements which restricts them

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from purchasing every share of the Company; and at all events the South Western Railway Company are entitled under their original agreement, carried out by the clause submitted to the committee on the bill, to subscribe £330,000, which will give them 6600 shares instead of 6500, ten more than the number to which the bill seeks to restrict the South-western Railway Company.

Mr. *Bethell*, Mr. *J. Parker*, and Mr. *Willcock*, in support of the bill.—What is sought by this bill is not the special performance of the agreement between the three parties; that was only introduced into the bill to shew the nature of the subsequent arrangement, which by this bill is sought to be enforced. The South-western Railway Company are seeking to do that indirectly which they cannot do directly; and the independence of the Southampton and Dorchester Railway, which it was the intention, as well of the shareholders as of the legislature, to maintain, will now be destroyed, unless the Court interfere: *Edwards v. Grand Junction Railway Company* (a). The Southampton and Dorchester Railway Company are seeking by this bill relief against the party by whom they are aggrieved, but do not in any manner wish to affect the interests of any other parties, but desire to leave such parties to their own remedies.

The VICE-CHANCELLOR.—It strikes me that it does not appear, on the face of the demurrer, that the Great Western Railway Company ought to be a party to the suit; for this reason, I suppose, because this bill takes up what I will call the offset of the case. The question which arises upon what may be called the conditions of the agreement, which this bill seeks to enforce (the conditions themselves being only a part of and auxiliary to the principal agreement, which relates to all the three companies)

(a) 1 My. & Cr. 650.

is this: the agreement, upon the face of it, is an agreement which extends during all time to bind the Great Western Railway Company not to interfere with the traffic upon the Southampton and Dorchester line; and the bill is filed not for the purpose directly and avowedly of having a specific performance of the agreement which comprehends the three Companies, but for having the subsidiary agreement carried into effect, as between the Southampton and Dorchester Company and the South-western Company: that, however, is only a part, and can only be considered as a part, and relief can be given upon it only as a part of the principal agreement, which binds all the three Companies. It is plain, to my understanding, that there cannot be relief in respect of that part of the agreement without seeking to have relief in respect of the whole; and it is plain to me, that the Great Western Railway Company themselves are as necessary parties to a bill for relief, founded on the original agreement, as that Company which is now made the sole defendant.

That appears to be one objection. Then there appears to be another objection, which is, that this bill seeks to have relief through the medium of restraining the South-western Railway Company to the acquisition of 6500 shares, whereas it seems to me to be the true construction of the agreement, and so the parties themselves thought, that, at any rate, they are entitled to 6600 shares. The bill contemplates, in a certain event, the acquisition of shares to the amount of £400,000, which would be the addition of £70,000 to the £330,000. Now, you will observe, in the original agreement it is said, "£325,000 or thereabout," or "about £325,000;" but it is perfectly plain, if you contrast that with the subsequent condition drawn up by Mr. Bircham, that the real thing contemplated was the acquisition of £330,000 worth of shares, that is, 6600 shares. It may be a mere arithmetical mistake, but it is perfectly plain to me, that, as the bill is

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framed, it has restricted the right of the South-western Railway Company within a limit not sanctioned by the agreement. Taking it altogether, it also appears to me, that, when it asks that the South-western Railway Company may be restricted from applying for, or requiring the registration of the deed of assignment, pro tanto it does tend to delay the emancipation of those who have sold from their liabilities; whereas, if it be sought in any degree to tend to continue the liabilities of those shareholders who have already sold their shares, it is manifest that those shareholders should be parties: and my opinion is, that the demurrer should be allowed.

BEFORE V. C. OF ENGLAND.

March 6th.

MONYPENNY v. MONYPENNY.

The guardian of an infant plaintiff, whose lands were intersected by railways and waggon-ways, from which he received a considerable rental, applied to certain Companies to insert in the bills they were applying for in Parliament a clause to the effect, that, in

THIS was a petition presented by the next friend of the plaintiff, an infant. It stated a report of the Master, whereby he found, that, over the estates of the plaintiff, situate in the county of Durham, were rail and waggon ways producing a considerable annual rental; and that notice had been given to the defendants of the intention of the promoters to bring into Parliament a petition to enable the Newcastle and Darlington Junction Railway Company to purchase the Durham and Sunderland Railway, and to make certain branch railways, and for other

case of their taking any part of plaintiff's land, they would compensate him for the loss or diminution in profit consequent on the traffic being transferred from the plaintiff's railways and waggon-ways to those of the Company. The Company having neglected to comply with this application, the plaintiff, by his guardian, presented a petition (in accordance with the finding of the Master) praying that he might be allowed to oppose the bill in Parliament, unless the insertion of such a clause as had been proposed to the Company, or some other arrangement to be sanctioned by the Master, should be agreed upon by them. The order was made as prayed.

purposes, for which portions of the plaintiff's property would be required; and also that the bill had been brought into Parliament, and read a second time, and ordered to be committed; and that notice had also been given for enabling the Wear Dock and Railway Company to make a certain branch railway in the county of Durham which would intersect the plaintiff's property. And he found, that an application had been made by the petitioner to the railway companies, to insert a clause to the following effect: "that whereas the branch railways, or some of them, would intersect the property of the trustees of W. D. C. M. (the plaintiff), on or over which property are railways or wayleaves by which coal and other minerals are or may be conveyed; and the making such branch railways may render useless the plaintiff's railways and wayleaves, and the rents and profits thereof be wholly or partially lost to the owners of the property; may it be enacted, that it shall not be lawful for the company to purchase, take, or use any of the plaintiff's lands without making compensation, not only for the lands required for the purposes of the act, and for damage done by the severance thereof, but also for all the loss or injury to be sustained by or with respect to the loss of the use of such railways or wayleaves, or the rents and profits thereof, or otherwise occasioned by the making the said branch railways; and that such compensation for such loss or diminution, or other injury, shall be settled and ascertained under the provisions of the Lands Clauses Consolidation Act, in the same way as if such last-mentioned act applied to compensation and satisfaction for a loss or injury of this nature in express terms."

The Company not having consented to this application, the petition prayed (in accordance with the finding of the Master) that the petitioner might be at liberty to present one or more petition or petitions to the House of Commons, and also to the House of Lords, against the said bill

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or bills, praying that such bill or bills might not pass into a law or laws without the introduction of a clause or clauses sufficient to ensure compensation to the petitioner not only for such part or parts of his land as might be taken by the said Company or Companies, but also for such injury or damage as he might sustain in respect of certain waggon-ways therein mentioned, or otherwise consequential on the taking such land, or consequent on making the said railway or branch railway, or either of them, under the said acts, or either of them; and that the petitioner might be at liberty to retain counsel, agents, or witnesses, for the purpose of opposing such bill or bills. But if the said Company or Companies should agree to insert the clause in such bill hereinbefore set forth, that the petitioner be at liberty to withdraw such opposition on the insertion of such clause or clauses: but if any other arrangement or agreement be proposed, then that the petitioner be at liberty, with the sanction of the Master, to assent to any arrangement or agreement that might seem meet; and, in that case, the Master be directed to settle and approve the clause or clauses then proposed to be inserted in such bill or bills, or any agreement then to be entered into, and for taxation and payment of costs.

Mr. *Stuart* presented the petition.

Mr. *Bagshawe* appeared on behalf of the trustees of the property, and consented.

The VICE-CHANCELLOR made the order as prayed.

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LONDON AND BIRMINGHAM RAILWAY TO
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Ex parte BOUVERIE.

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a petition praying a reference to the Master to the eligibility of a contract entered into by the petitioners for the purchase of a piece of land, to the effect that out of monies in Court to be laid out in land, to the like uses as land already taken by the company for the purpose of their act; and it also prayed that the costs, charges, and expenses, properly incurred in the act.

Where purchase-money of land taken by a railway company is in Court, to be invested in the purchase of other land, the Court will allow all costs, charges, and expenses, according to the act, of as many investments as may be necessary to consume the whole purchase-money.

Hoare, for the petitioners.

Hoare, for the Railway Company, objected to that prayer which asked for the costs, charges, and expenses, and stated that the Company had already been to a considerable expense for four successive purchases, and the proposed purchase would only take a very small portion of the sum in Court, and there would be recourses for further investments, and consequently the costs thrown on the Company were not reasonable, so that the petition was unnecessarily long.

CHANCELLOR.—I cannot refuse the petitioners according to the act. If the Company complained of investments, I can only suggest to them that they should find some suitable estate which would consume the whole of the monies in Court. The Railway Company poses all sorts of disagreeables upon the owners of the land which the Company must pay. As to the length of the petition, that is a matter for the consideration of the Court.

Ordered as prayed.

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March 27th. Ex parte A projected Undertaking for making a Railway from Boston to Sheffield.

Re 1 & 2 VICT. c. 117 (*a*).

Five of the directors of a projected railway company, by petition, prayed the payment out of Court of a large sum, standing in their names in the Bank of England, which had been paid in by them in compliance with the standing orders, to two bankers and two gentlemen (not petitioners). The order was made according to the prayer.

THIS was the petition of J. S., T. S. G., W. F., R. G., and W. G., five of the provisional directors of a projected railway from Boston to Sheffield, in whose names a sum of £157,000, the required amount of deposit, had been paid into the Bank of England, in compliance with the standing orders of the House of Commons, which, after stating that the Company had finally withdrawn their application to Parliament to obtain an act, prayed that the sum so deposited might be paid to J. P. Heywood and H. H. Kennard, (bankers), and M. P. Moore and G. Tallents, (gents).

Mr. *Montague* appeared for the petitioners.

The attention of the Court was drawn to the words of the act by the registrar of the court; and also to the fact that they had not been appointed by any legal instrument to receive the monies.

His Honor observed, that he had made a similar order before, and accordingly made an order according to the prayer of the petition.

(*a*) Sect. 4. See antè, p. 78.

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BEFORE THE LORD CHANCELLOR.

Ex parte The RECTOR OF LAMBETH, re THE SOUTH-
WESTERN RAILWAY COMPANY'S ACTS.

May 28th.

HIS was a petition on behalf of the Rev. C. B. Dalton, rector of the parish of St. Mary, Lambeth, stating, that, as such rector, he was seised, to him and his successors, of several houses in Union-place, Lambeth, subject, to certain parts thereof, to a lease dated June, 1779, the term of ninety-nine years, at the yearly rent of 3*½*d., and subject, as to other parts thereof, to a lease dated Nov. 1778, for the like term, and at the like yearly rent; and also stating the incorporation of the South-western Railway Company, and that, by the 8 Vict. c. 18, (the Lands Clauses Consolidation Act), it was enacted, that it should be lawful for all parties, being seised, possessed of, or entitled to any lands by the special act authorised to be taken, and required for the purposes of such act, or any estate or interest therein, and particularly for all corporations, tenants in tail or for life, all parties for the time being entitled to the receipt of the rents and profits of any such lands in possession, or subject to any lease for life, or for lives and years, or for years, or any less interest, to sell and convey or release the same to the promoters of the undertaking, and to enter into all necessary agreements for that purpose: and it was further enacted (sect. 9), that, except in the cases therein mentioned, the purchase-money or compensation should be paid for any lands to be purchased or taken from any party under disability or incapacity, and not having power to convey or sell such lands, except under the said special act, should not be less than should be determined by the valuation of two able practical surveyors, one to be named by the promoters of the under-

Rector of L., seised in right of his office of certain houses taken by a railway Company under the powers of their act, applied by petition for the investment of a sum of money which had been paid by the railway company for compensation, and for the reversion, and thereby prayed for payment of the dividends to the petitioner and his successors. It appearing that the houses in question were subject to leases, of which about thirty years were unexpired, at a nominal rent, the Court refused to make the order as prayed, but directed the investment and accumulation of the sum, with liberty to apply.

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taking, and the other by the other party, and that such surveyors should annex to the valuation a declaration, in writing, subscribed by him or them, of the correctness thereof: and it was further enacted (sect. 69), that, if the purchase-money or compensation which should be payable in respect of any lands, or any interest therein purchased or taken from any person having a partial or qualified interest only in such lands, and not entitled to sell or convey the same, except under the provisions of the said act or the special act, should amount to or exceed the sum of £200, the same should be paid into the Bank in the name and with the privity of the Accountant General of the Court of Chancery, to be placed to his account there "Ex parte the promoters of the undertaking in the matter of the special act," pursuant to the method prescribed by any act for the time being in force for regulating monies paid into the said Court, and should remain so deposited until the same should, by order of the said Court made on the petition of the party who would have been entitled to the rents and profits of the said lands in respect of which such money should have been deposited, be applied either in redemption or the purchase of the land-tax, or in or towards the discharge of any debt or other incumbrance affecting the same lands, or other lands settled therewith to the same or the like uses, trusts, or purposes, or in the purchase of other lands to be conveyed, limited, and settled, upon the like uses, trusts, and purposes, and in the same manner as the lands in respect of which such money should have been paid, stood settled, or in such other manner as in the said act mentioned; and that, until the money could be so applied, it might, upon the like order, be invested by the said Accountant-General in the purchase of £3 per Cent. Consolidated, or £3 per Cent. Reduced Bank Annuities, or in government or real securities, and the interest, dividends, and annual produce thereof paid to the party who would for the time being have been entitled to the rents and profits of the lands:

and it was by the said act further provided (sect. 74), "that where any purchase-money or compensation, paid into the Bank under the provisions of this or the special act, shall have been paid in respect of any lease for a life or lives or years, or for a life or lives and years, or any estate in lands less than the whole fee simple thereof, or of any reversion dependent on any such lease or estate, it shall be lawful for the Court of Chancery in England, or the Court of Exchequer in Ireland, on the petition of any party interested in such money, to order that the same shall be laid out, invested, accumulated, and paid in such manner as the said Court may consider will give to the parties interested in such money the same benefit therefrom, as they might lawfully have had from the lease, estate, or reversion in respect of which such money shall have been paid, or as near thereto as may be."

That, by an act of Parliament, 8 Vict., 1845, (with which the said Lands Clauses Consolidation Act was incorporated, and made subsequent to the passing thereof), intituled "The London and South-western Metropolitan Extension Act, 1845," the South-western Railway Company were authorised to take the hereditaments in Lambeth hereinbefore mentioned, and, under the powers of that act, they purchased the same hereditaments from the petitioner as such rector, subject to the leases, for £2500, which sum had been duly paid into the Bank of England, with the privity of the Accountant-General, as by the act provided. And the petition prayed, that the said sum of £2500 might be invested in trust in this matter, ex parte "The Lambeth Glebe;" and that the dividends and interest thenceforth to accrue due might be paid to the petitioner and his successors, the rectors of Lambeth, for the time being: and the petition also prayed the costs, &c.

Mr. *Kent* appeared for the petitioner.

The Archbishop of Canterbury, the patron of the living,

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and the Railway Company, appeared by their counsel, and consented to such an order as the Court should make, consistently with the provisions of the Lands Clauses Consolidation Act.

This petition was presented, on the 29th of May, to Sir *Knight Bruce*, V. C., but he considered the question to be one of so much doubt, that he recommended the parties to present it to the Lord Chancellor with his sanction.

THE LORD CHANCELLOR, (after stating the circumstances, and reading the 74th clause of the Lands Clauses Consolidation Act, and the prayer of the petition):—I feel great difficulty about this case. The calculation is, what is the present value of the compensation which is to be paid to the incumbent who shall hold the living at the time the leases fall in? If, therefore, I order the dividends to be paid to the present rector, I should do so at the expense of the future incumbent. I cannot grant the prayer of the petition. It requires a new act of Parliament; and I should recommend the present rector to apply to the ecclesiastical commissioners, that they might, by an act of Parliament, procure this sum to be laid out for the benefit of the living.

Order for investment and accumulation,
with liberty to apply.

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GRAY v. THE LIVERPOOL AND BURY RAILWAY
COMPANY.

March 23rd
& 28th.
April 30th.
May 2nd &
28th.

Bill, filed on the 26th of February, stated the Liverpool and Bury Railway Act (8 & 9 Vict. c. clxvi); and the time of the passing the said act, plaintiffs were seised of certain lands, part of which was freehold, and some held under demises for terms of years, of which about 100 years remained unexpired, on which were erected extensive cotton-spinning mills, weaving-sheds, and other buildings, necessary for carrying on their business of cotton-spinning, which had been erected at a cost of £30,000, and houses and cottages for the work-people; and that a sum of more than £65,000 had been engaged in the works, producing a profit of several thousand pounds annually.

That the locality of the premises was well adapted for the purposes of the said trade, and that any interference with their air mills and buildings would be attended, not only

Plaintiffs were the owners of very extensive mills and other factories necessary for carrying on their business of cotton spinners, and also were possessed of all the lands adjacent thereto, and lying within the limits of deviation required by a railway company for the formation of their proposed line. The plaintiffs, apprehending that, if the intended railway should be made in the manner proposed, their

would be materially injured, presented their petition and opposed the bill in committee. The committee having refused to proceed unless some compromise were entered into by the plaintiffs, the following clause was agreed upon:—"Whereas John Gray and William Gray are the owners and occupiers of certain mills, lands, and buildings, situate at Bury, through which the lines of the railway, as delineated on the plans and sections annexed to, passes, be it enacted that it shall not be lawful for the said company, without the consent of the said John Gray and William Gray, or the owners or owner for the time being of the said mills, lands, and buildings, to construct the said railway nearer to the same mills, lands, or buildings, or any of them, than the south-east end of Lever Bridge delineated on the plans and sections annexed to, and therein numbered (1)."

On the insertion of this clause, the plaintiffs withdrew their opposition, and the bill passed. The Company having given notice to the plaintiffs that they intended to proceed with the construction of their railway through their property, but in a different line to that originally proposed, the plaintiffs filed their bill and moved for an injunction.

By the Master of the Rolls, that, on the construction of the clause, the company had no right to make the railway through the plaintiffs' lands until they had entered into an agreement with them, and that they were entitled to an injunction, which was accordingly granted.

By the Lord Chancellor, on appeal, that, as the question involved a question of law, and the plaintiffs required it, the Court was not justified in deciding the right to a perpetual injunction without giving them an opportunity of having the opinion of a court of law.

The motion should stand over, and the injunction in the meantime be continued, plaintiffs undertaking to proceed immediately to the trial of the legal question.

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with great inconvenience, but greatly diminish the value of the property.

That, in December, 1844, a scheme had been set on foot for applying to Parliament for an act to sanction the formation of the above-mentioned railway; and, in the month of December, plaintiffs received a printed notice, informing them of the intended application to Parliament, and that the property mentioned in the schedule thereto would be required for the purposes of the undertaking. The schedule contained two divisions: one purporting to describe the property of plaintiffs as then laid out, and the other the property of plaintiffs within the limits of deviation, which latter division comprised the greater part, and nearly all of their lands and property.

That, upon inspection of the plans and sections deposited with the clerk of the parish of Bolton-le-Moors, the south-east end of Lever Bridge was marked out, and plaintiffs ascertained that if the intended railway should be made in the manner proposed, the line would pass directly through and over several of plaintiffs' houses and buildings, and the gort or feeder by which the mills were supplied with water, and would pass close to an intended extension of plaintiffs' mills; and that it appeared that it was intended to carry the railway upon an embankment, which, when completed, would be at an elevation of nine feet above the ridge of the roof of the cotton-mills; and, inasmuch as the plaintiffs' property was bounded on the south side by an aqueduct of the Manchester and Bolton Canal, a very heavy structure, carried at an elevation above the roof of the mills, and was bounded on the east side by a hill rising abruptly considerably higher than the mills, the effect of the intended railway being made would be, to shut in plaintiffs' mills and buildings, and thereby interfere with and impair their manner of carrying on their business, and also deteriorate the value of the pro-

; and also, that, there being a coal-mine at from six-
to twenty-five yards below the surface of the ground,
was great reason to apprehend that the weight of
abankment would have the effect of depressing the
e of the land, and interfere with the gorts so as to in-
t the supply of water to the mills.

t plaintiffs determined to oppose the intended appli-
to Parliament, and petitioned against the bill, and
ed by their solicitors and counsel before the com-
in opposition thereto, and, after some attempts at
ation, and after the chairman of the committee had
sly stated it was a very hard case on the plaintiffs,
ad refused to proceed with the proposed clauses in
l, until sufficient indemnity should have been given
intiffs against such loss and injury as they would
t by the making of the railway in the manner then
ed, a clause was agreed to by the plaintiffs and the
ters of the bill, and approved of by the committee,
e bill passed into the act hereinbefore mentioned;
/ the 14th section, after reciting that plans and sec-
f the railways and branch railways, shewing the lines
vels thereof, and also books of reference containing
mes of the owners, lessees, and occupiers, or reputed
s, lessees, and occupiers of the lands through which
me were intended to pass, had been deposited with
ark of the peace of Lancaster, it was enacted, that,
t to the provisions in that and said recited acts con-
, it should be lawful for the Company to make and
ain said railways, branch railways, and works in the
and upon the lands delineated upon the plans, and
bed in the books of reference, and to enter upon,
and use such of said lands as should be necessary for
purpose; and that the 92nd section of said Liver-
and Bury Railway Act, 1845, was in the words fol-
g, that is to say:—"And whereas John Gray and

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W. Gray are the owners and occupiers of certain mill lands, and buildings situate at Darcy Lever, through which the line of the railway, as delineated on the plans and sections before referred to, passes; be it enacted, that it shall not be lawful for the said Company, without the consent of the said J. Gray and W. Gray, or the owner or owners for the time being of the said lands, mills, and buildings to construct said railway nearer to said lands, mills, and buildings, or any of them, than the south-east end of Lever Bridge, delineated on said plans."

That, on the 11th of August, 1845, plaintiffs received notice from the secretary of the Company, containing an intimation that the engineer of the Company was about to lay out the line of the railway; whereupon plaintiffs, by their solicitor, sent a letter in reply to the Railway Company, informing them, that, if their engineer, or any person employed by them, should enter upon plaintiffs' lands, they would proceed against such person as for a wilful trespass and they gave them notice that they would not permit them to make a railway nearer to their mills than the south-east end of Lever Bridge.

That the Railway Company thereupon wrote to plaintiffs stating that the notice sent by the Company was merely to apprise the landowners generally, that the engineer was about laying out the line, and was not intended, in any instance, to interfere with arrangements already entered into with particular parties.

That the Company did not enter upon, or interfere with plaintiffs' property until 9th February, 1846, when certain workmen and labourers in the employment of the Company entered upon plaintiffs' lands, and cut a furrow of the length of about 140 yards, for the purpose of marking out the line in which it was proposed by the Company to construct their railway, although the same was nearer to the plaintiffs' mills, lands, and buildings, than the south

east end of Lever Bridge, and although they had not consented thereto (a).

That they had applied to the Company to discontinue their proceedings, and abandon their intention of making their railway over plaintiffs' lands nearer than the south-east end of Lever Bridge, and without the consent of plaintiffs, but they had refused to comply with such requests; and the bill, after charging (amongst other things) that, if the Company carried their threat into execution, plaintiffs would not only be deprived of the protection of the 92nd section, but that their property would be greatly damaged and injured, and their business impeded and prejudiced, prayed that the defendants might be restrained by injunction from constructing their railway nearer to the plaintiffs' mills, &c., than the south-east end of Lever Bridge, in the said act mentioned, and from entering or remaining upon, using, disturbing, or otherwise interfering with the plaintiffs' lands and property, or any part thereof, nearer than the south-east end of Lever Bridge, without the consent of plaintiffs.

The plaintiffs moved, before the Master of the Rolls, for an injunction according to the prayer of their bill; and, on the 23rd March, after argument on both sides, his Lordship adjourned the argument to the 28th, recommending both parties to come to terms in the meantime.

The parties not having effected a compromise, on that day the argument was concluded.

Mr. Kindersley and Mr. Bacon, for the plaintiffs.

(a) This furrow, as delineated on the plans, ran almost parallel to the line originally marked out by the Company, commencing from the south-east end of Lever Bridge, and running eastward on the north side of a public road which separated the proposed line from the plaintiffs' mills.

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Sir *F. Kelly*, S. G., Mr. *Rolt*, and Mr. *Palmer*, for the defendants (a).

THE MASTER OF THE ROLLS.—I think it is exceedingly to be regretted that the parties have not been able to come to some sort of arrangement or compromise, so as to prevent this litigation, and the necessity of any order. However, as they have been so unfortunate as not to be able to do so, it is for me to give the best opinion I can.

In these cases it is always to be borne in mind that the acts of Parliament are acts of sovereign and imperial power, operating in the most harsh shape in which that power can be applied in civil matters,—solicited as they are by individuals for the purpose of private speculation and individual benefit; they are not passed by the Legislature otherwise than in the notion that they contribute to the public good so materially, as to make it even for the general benefit to violate the private property of individuals. For the sake of that which is supposed to be the public good, and which, upon the consideration of a particular act which has passed, we are bound to consider is on the whole for the public good, the Legislature thinks fit to take away from private individuals that which is undoubtedly their own absolute property, and allows it to be disposed of in any way that the act permits, and at a price which is to be fixed by authority, if need be, without any voice of their own in the matter. Whoever considers the effect of what is done, must see the consequences which frequently do happen to individuals: that to which they have attached their fortunes, and all their interests in life, may be taken from them by an absolute exercise of imperial power, and the whole of their circumstances and situation may be entirely altered for a sum of money to be fixed by somebody else.

(a) The arguments of counsel are given, post, p. 247.

This Court, I believe, has always looked on these things in the light I have now mentioned. Again and again, though not so frequently as of late years, these matters have been under consideration. At one time the doctrine held in this Court was, that, unless those who had obtained the powers, and were enabled to carry on such a speculation, could satisfactorily shew that they had the means of completing the whole, and not a part only of that which was alleged to be for the public good, they should not be allowed to invade any man's property in the execution of only a part. The hardship imposed on individuals has, I am glad to think, and there is good reason to believe, been subject of late years to a great deal more anxious consideration than it used to be; it is probably the frequency of them, and the vast extent of the works, which have occasioned that particular consideration. I think one may say it has almost become a rule, that, where the property of the party does not possess any peculiar value, Parliament will adopt the course which has become all but general in such cases; but, if the property does possess some peculiar value,—if it is to pass over a certain portion more valued than any other, if it invade a right to which the owner may be considered to be more peculiarly attached,—in such cases, Parliament will facilitate and encourage agreements between the parties who possess such properties and those who desire to take them away, and, in cases in which those agreements cannot be at once framed, will refer the parties to an agreement subsequently to be entered into between themselves; and so it appears to be in this particular case.

In the course of the last year, the promoters of this railway from Liverpool to Wigan, Bolton, and Bury, were soliciting an act of Parliament to construct a railway which passed through property belonging to different persons, and amongst others through property belonging to and occupied by the plaintiffs in this case. The plain-

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tiffs, conceiving that this property was of peculiar value which was not to be determined according to the general rules adopted in cases where there is no specific and peculiar value, opposed the bill. It appears, from the evidence offered now, that that opposition was successful to this extent, that it was decided, that, unless some arrangement could be made, or some agreement entered into between them, the bill would not pass so as to subject the plaintiffs to the ordinary rules which are established in such cases. In that state of things an attempt was made for a compromise and agreement. Most unhappily, I think, for the interest of all persons who are concerned in this matter, that attempt was not successful; but it is plain, and, whether it so appears in the evidence or not, I certainly do presume, that they were both of them in such a state of mind after the communication they had had with each other, that they believed they could come to an agreement. I do not say there was anything specifically pointed out,—probably not; but they believed they could come to some agreement. If they had not had this belief, Messrs. Gray, the plaintiffs, would not have insisted on those clauses, neither would the Company have agreed to place themselves in their power, which they would do, unless they could come to an agreement; but after they had failed to come to an agreement by consent this clause was agreed upon. Now the clause is this:—“Whereas John Gray and W. Gray are the owners and occupiers of certain mills, lands, and buildings, situate at Darcy Lever, through which the line of the railway, delineated on the plans and sections before referred to passes; be it enacted, that it shall not be lawful for the said Company, without the consent of the said John Gray and W. Gray, or the owners or owner for the time being of the said mills, lands, and buildings, to construct the said railway nearer to the same mills, lands, and buildings, any of them, than the south-east end of Lever Bridge, and

lineated on the said plans, and therein numbered 1." They are not to construct the railway "nearer to the same lands, mills, and premises;" it is not said, nearer to any part specified, but, not nearer to the mills, lands, and buildings than the south-east end of Lever Bridge.

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Now, the collective description or names "mills, lands, and buildings," include the whole and every part of those premises of which John Gray and William Gray are the owners and occupiers,—they were the owners and occupiers of the whole property delineated on the map; and the railway is not to be constructed nearer than the south-east end of the bridge, which bridge comes over the river Tonge, and is continued immediately on the road which has on both sides a portion of these lands. The words themselves do not seem to be attended with any difficulty: "you shall not come nearer to my estate;" it may have been, "you shall not come near to it at all, in any part;" but, in argument, it is said that that cannot be the construction; and really the question is, whether there is anything to overcome that which is the plain and natural construction of the words.

In the first place, it is said this construction would make the formation of the railway dependent altogether on the will of the Messrs. Gray. That does not in itself (though it is said to be) seem very absurd; but it is said that cannot be so, because the whole scope of the act clearly manifests, that, at all events, the railway was to be made. How is that? A railway is to be constructed, but it is to be constructed subject to the provisions in the act; and this is a provision in the act, and therefore it is not that the railway is to be constructed at all events, but it is, that the railway is to be constructed subject to the provisions of the act, including, among others, this clause: therefore, that does not go far. Then, it is said that you must give for this purpose a restricted meaning to the words "mills, lands, and buildings." Why must you? There is no distinction made in the act. But it is said the words

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"mills, lands, and buildings," must mean either those which are employed in the factory, and which give the particular special value to this property, or they must have some other restricted meaning found out in some other way. I must say, I think there has been a great deal of very ingenious argument used on that subject; but I do not find anything to convey to the mind a conviction that this was the intention of both parties.

As to all the arguments urged, that the Legislature intended this or that, I think nothing of them. The Legislature had no object but to provide that there should be an agreement between the parties. The Legislature meant that, provided this agreement should be made, the railway should be constructed. Now, it has been stated, and urged in argument, with a great deal of ingenuity, and certainly with some plausibility, that, supposing there were to be a railway, the intention was to keep the railway as far off the other part of the plaintiffs' property as the south-east end of the bridge, and that it might be constructed on a parallel line,—there is a great deal of plausibility about this; but there are no words in this clause of the act which in the least degree approach to an indication of any such thing being meant; and I may apply this observation to the whole of those constructions, that if any one had been meant, the full effect of such construction might have been as clearly expressed in as many words as are employed in this. If any one of the propositions was the real meaning of these parties, why was it not stated? If it was not the real meaning of both sides, why are we to constrain the construction of the words that are found in the act?

Now, with respect to these acts of Parliament, I have had the opinion of Lord *Cottenham* on this subject stated to me (a); and, coming from him, I must say I consider it coming with peculiar weight, because he never has, at any

(a) *Webb v. Manchester and Leeds Railway Company*, ante, Vol. 1, p. 576.

period, in the numerous cases which were at one time before every branch of the Court, shewn the least disposition to press any harsh construction against Railway Companies. On the contrary, he has been most anxious to uphold them (and sometimes in cases of considerable difficulty) in the legal exercise of those powers with which Parliament had invested them. The effect of what he says I understand to be this: "If Parliament has authorised the thing to be done by agreement, it is nonsense to come and ask to put a liberal construction upon it. The rights are to be determined and affected by the agreements themselves. I must not look at consequences. I must not look to the consequence of giving operation and effect to that which I consider agreed on between the parties. They have agreed, and the Legislature has allowed them to agree on the terms on which they will give up their land."

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So here, it may be that the terms which are demanded may be very exorbitant—I know nothing of it one way or the other: it may be that very fair and just terms were refused—I know nothing of that; but, taking this to be the expression of an agreement, I think the agreement is, that you are not to enter upon these lands, that is, you are not to enter upon these lands if you must do so by coming nearer than the end of the bridge. If that is the meaning of it, I must take it to be so intended. How, then, is this to be altered? I think it can hardly be altered without Parliament. I do not see how I am to make an agreement, or, by putting a liberal, that is to say, in this case, a forced construction on this act of Parliament, to compel these persons to give up their land, which they have not agreed to give up, for the price that has been offered to them. I am surprised at the course which the parties have taken—I regret it. I cannot help thinking, that if, instead of the general notice given in the month of August, there had been a communication to this effect:—"Now, let us try to agree to some terms:" the terms would have been settled. That was not done; the

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common notice was given,—it excited alarm; the alarm was appeased to some extent by the answer received to it, and the whole matter was entirely disregarded. It is said here, and I believe perfectly according to the facts, (whether it happens in many cases I do not know), that these gentlemen possess the whole tract of land between the utmost bounds of deviation; and it is a peculiarity here, that, by refusing to agree, or by being unable to come to an agreement, the railway is stopped altogether. If this be so, was it not known to the parties at the time? Had they not maps? Had they not everything ascertained at that moment? Did they not see at that time, that, if there was no agreement, there could be no railway? I am not at all clear that this may not lead to much more serious inconvenience than has yet been apprehended; and it was with a view to this that I adverted to what had been the doctrine of the Court at one time, and might be applied as a doctrine again.

If it be shewn that the plan marked out by Parliament cannot be executed, have you a right to do anything at all with the railway? If it is clear that the object to which Parliament intended this railway to be applied—a communication by railway from Liverpool to Bury—cannot be attained, and if it is perfectly clear that a part of the line is cut off, and the whole of it cannot be effected, it cannot be intended, that, notwithstanding that, this Railway Company, who are authorised to make the whole line for the public benefit, have a right to persist, and invade the property of individuals in order to complete a part only. Now, I state this to shew how strongly I feel what was the duty of this Railway Company; that, as to all those things with respect to which they were dependent upon individual agreements, it was their duty to have had those agreements settled before they began to cut anywhere. It is a strange thing, indeed, if men's properties are to be taken from them in this way with a view to an integral benefit to the public, when the parties have not

done those things which it was incumbent upon them to do in order to secure the capacity and ability to ensure it. However, that is not part of this application. I am of opinion, that, on the construction of this clause, they have not a right to make the railway through these lands till they have entered into an agreement with the plaintiffs; and I shall therefore grant this injunction.

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From this judgment the defendants appealed.

Sir *F. Kelly*, S. G., Mr. *Rolt*, and Mr. *Roundell Palmer*, for the appellants.—It never could have been the intention of Parliament to make the construction of the railway depend upon the caprice of an individual. What Parliament has done is this: it has determined that one portion of the plaintiffs' property should not be taken without consent; but, as to the other portion, it leaves it subject to the usual powers, which it was the object of the Company, in going to Parliament, to obtain. The preamble of the bill, shews that the works are public, and to be for the public good. There is a distinction between the lands situate on the line delineated on the Parliamentary plans and the lands situate generally within the limits of deviation. This distinction is constantly preserved. The Standing Orders (a) require notice to be given to landowners previously to the bill being brought before Parliament; and this notice must have a schedule attached to it, dividing into distinct columns the "property in the line as at present laid out," and the "property within the limits of the deviation intended to be applied for:" they also require all the lands to be defined on the parliamentary plans with numbers. In this case, the required notice was given, with the usual schedules; and, when a clause is inserted in an act for the benefit of a landowner, it must have relation to the line as delineated on the parliamentary

(a) 23rd and 24th.

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plan, and the lands numbered and defined in the first schedule, and cannot be understood to apply generally to the lands within the limits of deviation mentioned in the second schedule. By the words "mills, lands, and buildings" were meant the particular lands used with an in connexion with the mills and buildings through which the line as originally laid out actually would have passed and had no reference whatever to the other property of the plaintiffs. The only restriction laid on the defendants in the construction of their line was, that they should not go nearer to the original line (in the plans coloured red) than the south-east end of Lever Bridge, which line as originally drawn, was not a mere mathematical line, but a line representing the line of the railway, and, therefore, of the breadth of the proposed railway, as laid down and distinguished in the parliamentary plans. They did not mean that the Railway Company were not to construct their railway nearer to the plaintiffs' lands generally than the south-east end of Lever Bridge, including under the term "mills, lands," &c. the whole of the property of the plaintiffs comprised within the lines of deviation allowed by the 15th section of the Railway Clauses Consolidation Act, but they meant to prevent them from constructing their railway nearer to the mills, &c., specified and numbered in the first schedule of the plans required by the Standing Orders, than the south-eastern end of Lever Bridge. If the plaintiffs' interpretation were to prevail, the making the railway at all would be at their mercy; for the whole of the land within the limits of deviation belongs to the plaintiffs. The applicants are not to construct their railway nearer to certain specified parts of the respondents' premises than the distance which lies between those specified parts and a fixed point, without consent; but they are empowered to construct their railway through the respondents' lands, without consent, on giving fair compensation, provided they keep at the distance from the specified parts of the property required by the 92nd section of the act; that is, they must

run in a line nearly parallel to the original line proposed, at a distance equal to the distance from the former line to the south-east corner of Lever Bridge. If the property of the respondents was not to be invaded at all, why was a spot within their boundary mentioned?

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Mr. Bethell, Mr. J. Parker, and Mr. Bacon, for the respondents.—It is quite clear, from the course taken by the committee when the bill was before them, that they considered Mr. Gray's interest as an invincible obstacle to the formation of the railway, which could not be overcome, except by special agreement; and the 92nd clause must be considered as the result of that special agreement. The general features of the act shew that the respondents were supposed to have the entire power and control of the formation of the railway over their lands, under the 92nd section; for, if it were otherwise, the act would have contained other clauses and provisions in their favour. The Company were compelled to get their bill on any terms, and they must not now turn round, and say those terms are hard, when the persons with whom they contracted had, at the time they contracted, the power of preventing them from proceeding at all. They can complete their railway up to Lever Bridge. The words "mills, lands," &c., must mean the whole of the plaintiffs' property within the limits of deviation, because they are not compelled and never undertake to proceed in any one line. The plain meaning of the section is the one the Court is bound to adopt: *Webb v. Manchester and Leeds Railway Company (a)*. If the Railway Company meant, at the time of the agreement for the clause, to reserve to themselves the right of going over any part of the respondents' land, they were guilty of a fraud on the committee and on the respondents; for the affidavits in support of the injunction distinctly state, that the words "mills, lands,"

(a) Ante, Vol. 1, p. 576.

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&c., were never used by the respondents, or intended to be used, in a restricted sense.

The *Solicitor-General* was proceeding with his reply when the *Lord Chancellor* said :—"The question is, whether, when this cause comes to a hearing, this Court will decide it without sending it to a Court of law. The rule has been, if the question involves a question of law, and the circumstances require it, to grant the application : *Bacon v. Jones* (a). I do not think I should be justified in deciding the right to a perpetual injunction on a subject so full of doubt without giving the appellants an opportunity of having the opinion of a Court of law : see *The Dean and Chapter of Ely v. Bliss* (b), and *Salkeld v. Johnston* (c)."

ON the 28th May, the minutes were, after discussion, finally settled, and thereby it was provided, that the motion should stand over, and the injunction, in the meantime, to be continued, plaintiffs undertaking forthwith to deliver a declaration in an action of trespass, for obtaining the opinion of the Court upon the question, whether, under and by virtue of the Liverpool and Bury Railway Act of 1845, the defendants were empowered to construct the railway over any part of the plaintiffs' lands, in the premises of the cause mentioned, without the plaintiffs' consent. Short notice of trial: liberty to amend pleadings and to convert into a special case if the Judge so directed, with permission to turn that special case into a special verdict at the request of either party. Both parties to make such admissions as they can.

(a) 4 My. & Cr. 433.

(b) Not reported.

(c) 1 Hare, 196. Not reported on appeal, when the Lord Chancellor (*Lyndhurst*) directed a case

to be sent for the opinion of the Court of Common Pleas. See *Gordon v. The Cheltenham Great Western Union Railway Company*, ante, Vol. 2, p. 872

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BEFORE V. C. KNIGHT BRUCE.

WILSON v. STANHOPE.

April 24th.

THE bill in this suit, filed by R. H. H. Wilson, on behalf of himself and all other shareholders in a Company provisionally registered, called "The London and Manchester Direct Independent Railway," (Remington's Company), except such of them as were defendants thereto, against the Hon. Leicester Stanhope, and the other persons forming the provisional and managing committee of the Company, stated, that George Remington devised a plan for connecting London with Manchester by a direct railway, and surveyed the country, and marked out, in proper maps and plans, the line of such railway, which was considered the most direct and practicable line by all persons connected with such undertakings; and that, in April, 1845, a scheme was projected and the formation of a Company commenced, which Company was duly provisionally registered, and had for its object the formation of the railway according to Remington's design; and the scheme was proposed to be carried into execution by means of a capital of £3,000,000, divided into 60,000 shares of £50 each.

That the formation and objects of the Company were advertised by the projectors, and the project was generally considered to be, and in fact was, one of much probable value and success; and no other railway in a direct line from London to Manchester had thitherto been advertised or projected.

That the projectors afterwards determined to add to the said original undertaking a branch line to Crewe, and to increase the capital to £5,000,000, in 100,000 shares, which alteration was provisionally registered and advertised.

A shareholder in a Company advertised to be formed for the purpose of carrying out a line projected by A., filed his bill, on behalf of himself and all other shareholders in that Company, except the defendants, against all the members of the provisional committee, alleging that they had abandoned their project in favor of one projected by B., and also alleging various acts of misconduct and waste of the Company's monies; and praying for various accounts, a receiver, and an injunction.

Demurrer to this bill, for want of equity and for want of parties, overruled without prejudice; and costs, with consent of the plaintiff, reserved.

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That plaintiff was made acquainted with the scheme by the advertisements, and applied for shares, and obtained a prospectus, in which the advantages and objects of the proposed scheme were set forth, as hereinbefore stated; and the names of twenty of the defendants were inserted as the acting committee of management of the Company, with power to add to their number; and Messrs. G. S. & H., and J. O., and W. R., and R. H. W., and R. B. B. C. were therein named as the solicitors of the Company.

That, from the first project up to the date of the bill, the said twenty defendants, who had associated with themselves four other persons (also defendants), had been the projectors and managers, and had had the whole control and management of the affairs of the Company, and no other person or persons had interfered therewith.

That plaintiff, relying on the representations contained in the prospectus and advertisements, applied to the defendants for shares, and received a letter of allotment for twenty-five shares, in respect of which he paid the deposit, and signed the subscribers' agreement and parliamentary contract, wherein the purpose and object for which the plaintiff and the several other shareholders had become responsible were stated to be in accordance with the objects described in the advertisements and prospectus; and he thereupon received a certificate for twenty-five shares, signed by two of the defendants and the secretary of the Company.

That, in the month of August, 1845, applications for shares very far exceeding the number of shares to be allotted had been made by solvent and responsible persons, and the defendants might have procured them to take all the shares in the Company; and all the persons to whom shares had been allotted, other than the defendants, had duly paid the deposits; and a large sum of money had come into the hands of the defendants, in trust for the Company.

That the defendants were in a position to have complied with the Standing Orders of the Houses of Parliament, re-

quiring certain plans and sections and sums of money to be deposited some time prior to the introduction of a petition for a bill for making such railway, and to have applied during the then present session for an act.

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That, the shares being at a considerable premium, and the undertaking appearing likely to be very successful, another Company projected and advertised a rival scheme, called "Rastrick's Line," merely on speculation, no line for a railway between London and Manchester having then been surveyed or fixed on by Mr. Rastrick, or by any Company using his name. That the rival Company was not in a position to comply with the Standing Orders, and met with very little favour; and very few applications for shares were made by solvent persons.

That plaintiff had then lately discovered, as the fact was, that the defendants, in violation of their duty as managers of Remington's line, had wholly abandoned the said undertaking, and wilfully abstained from giving the notices, depositing the surveys, &c., required by the Standing Orders, and had incapacitated themselves from applying for an act, and had entered into a corrupt bargain and agreement with Rastrick's Company, by which they had given up Remington's line, and all the maps, &c., and thereby enabled Rastrick's Company to comply with the Standing Orders, and apply for an act.

That the abandonment by the defendants of the original project, and the agreement with Rastrick's Company, had been entered into without the privity or consent, and against the wish of the plaintiff and the other shareholders on whose behalf plaintiff sued; and no general meetings had ever been called by the defendants to sanction and approve the same.

That the agreement entered into with Rastrick's Company was wholly destructive of the purpose and object of Remington's Company, and inconsistent with the views with which the plaintiff became a shareholder; and that

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the undertaking of Remington's Company was wholly frustrated, and any further prosecution of it would be useless and tend to waste the funds of the Company.

That the defendants had been induced to enter into said agreement in consequence of breaches of trust and of mismanagement committed by themselves, and also of the advantages conceded by Rastrick's Company to the defendants for their own private advantage; and, as evidence of misconduct in the management of the Company, it stated, that, although applications were made to the defendants to an amount exceeding the number of shares, 70,000 were allotted, and 30,000 were reserved for their own use, and for the use of their private friends; and no person had accepted the said 30,000 shares, or applied for them, or signed the parliamentary contract or subscription agreement, or paid the deposit in respect thereof.

That, by direction of defendants, no entry was made in respect of the reservation of the said shares; and that there were no persons who would be willing to take the same, unless the defendants should be compelled to do so.

That the defendants had wasted and misapplied the deposits to a large amount, and had therewith bought up at a large premium, all shares which were offered for subscription, some of which they resold at a larger premium, and retained others, and had also bought shares and stock in other companies at large premiums with a portion of the deposits made by shareholders in Remington's Company, whereof a sum of £15,000 and upwards, part of the deposits, had wholly lost to that Company.

That, by the means aforesaid, the amount of deposits became inadequate to enable the defendants to apply to Parliament, and that they threatened and intended to apply the remaining part of the deposits to some purpose inconsistent with the objects for which the deposits had been paid.

That, as a consideration for abandoning their undertaking to Rastrick's Company, the defendants had received

from that Company a large sum of money for their own use, and a promise of shares and various advantages.

The bill, after stating the usual applications and requests, (among other things) charged, that the arrangement with Rastrick's Company was not an amalgamation of the two Companies, but an abandonment by defendants for their own advantage; and that they had practised a fraud on the plaintiff by obtaining him to execute the contracts and pay the deposits for a purpose which had wholly failed, and, in fact, had used the support and monies of the plaintiff to benefit Rastrick's Company.

That the defendants alone had the power of convening a meeting.

That, shortly after the said arrangement, the defendants applied to the solicitors of the Company, and requested them to deliver up the maps, plans, &c., in order that they might be handed over to Rastrick's Company; but they refused to do so, on the ground that the agreement was illegal.

That the defendants, in order to obtain possession of the maps, &c., paid the sum of £3000 among Sir G. S., H., R., and C., (the solicitors of Remington's Company), and, in addition thereto, the sum of £10,000 to the said Sir G. S., and £5000 to each of the said H., R., and C.

That the said sums were paid out of the deposits of shareholders in Remington's line, and no bills of costs had been delivered by or required from the said solicitors; nor was any sum of nearly the amount paid, due to them from the Company.

The bill, after certain allegations as to the impossibility of making all the shareholders parties, which are set forth in the judgment, prayed an account of all costs, expenses, and disbursements properly incurred by the defendants in the formation of Remington's line, and that, when ascertained, they might be distributed rateably on each share in the said Company; and that the defendants might be declared entitled to, and be liable in respect of, all shares reserved, or not

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allotted: that the defendants might be directed to pay the plaintiff and other shareholders the remainder of money received for deposits, after deducting the proportionate amount in respect of costs; and that an account might be taken of all dealings and transactions of the defendants relating to the Company during the time they had acted in the managing committee, or as the provisional directors; and that, in taking such account, the defendants might be charged with the full amount of the deposits which were or ought to have been payable upon the shares which were reserved, or not allotted, and also with all sums expended by them out of the Company's assets in the purchase of shares in the same Company, or of stocks or shares in any other Company, or received by them by way of profit from the re-sale of any shares or stocks so purchased by them. And the bill also prayed, that the defendants might be decreed to pay to the Company the sum of £28,000, payable to Sir G. S., Mr. H., Mr. R., and Mr. C., and all other monies improperly paid by defendants; and might be decreed to pay and assign to the Company all monies, shares, promises of shares, and other benefits and advantages received by them as the consideration for the bargain and arrangement entered into with Rastrick's Company; and might be decreed to make good to Remington's Company all loss accrued to that Company, under the circumstances therein stated, or otherwise, in consequence of the mismanagement, misconduct, or neglect of the defendants; and also an account of all property then belonging to the Company, and for a receiver, and for sale of such of the property as might be required to be sold, and for an injunction to restrain the defendants from intermeddling with the affairs of the Company, and for an account of the debts and liabilities of the Company, and for application of the property of the Company in satisfaction of the same.

To this bill the defendants put in a demurrer, for want of equity and for want of parties.

Mr. *Bacon* opened the pleadings for the plaintiff, who had set down the demurrer for hearing.

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Mr. *Cooper* and Mr. *Goodeve*, in support of the demurrer.—The relief prayed by the bill is inconsistent with the continuance of the partnership, and a dissolution is the real object and intention of the parties in filing this bill. Although, in certain cases, the strict rule, that all persons materially interested must be parties, is dispensed with (*a*), yet the Court will not permit a plaintiff to go into transactions involving a winding-up of the affairs of the partnership, except with a view to a dissolution; and if a dissolution is sought, then the Court requires that all the partners shall be on the record. Where partners are too numerous, the general rule applies, that some few of a class may be made defendants, and represent the whole; but in such a case there must be no conflict of interest in the class which such persons represent. In the present suit, two classes are represented by the plaintiff, viz. the shareholders who say a fraud has been committed on them, and those who do not make such a charge: and these again are divided into two classes, viz. those in favour of *Rastrick's*, and those in favour of *Remington's* line. The allegation as to the inability of the plaintiff to discover all the shareholders cannot be true, inasmuch as, when a Company is registered, (which is stated by the bill to have been done in this case), the Joint-stock Companies Registration Act, 7 & 8 Vict. c. 110 (*b*), requires that the names of all the shareholders,

(*a*) *Cockburn v. Thomson*, 16 Ves. 321.

(*b*) Sect. 4 enacts, "That, before proceeding to make public, whether by prospectus, handbill, or advertisement, any intention or proposal to form any Company for any purpose within the meaning of this act, whether for exe-

cuting any such work as aforesaid under the authority of Parliament, or for any other purpose, it shall be the duty of the promoters of such Company, and they or some of them are hereby required, to make to the office hereby provided for the registration of joint-stock Companies (and herein-

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together with their occupations and residences, registered.

after called the Register Office) returns of the following particulars according to the schedule (C) hereunto annexed; that is to say, 1. The proposed name of the intended Company; and also, 2. The business or purpose of the Company; and also, 3. The names of its promoters, together with their respective occupations, places of business (if any), and places of residence; and also the following particulars, either before or after such publication as aforesaid, when and as from time to time they shall be decided, viz. 4. The name of the square, street, or other place in which the provisional place of business or place of meeting shall be situate, and the number (if any) or other designation of the house or office; and also, 5. The names of the members of the committee or other body acting in the formation of the Company, their respective occupations, places of business (if any), and places of residence," &c.

Sect. 7 enacts, "That it shall not be lawful for any joint-stock Company hereafter to be formed for any purpose within the meaning of this act, whether for executing any work as aforesaid under the authority of Parliament, or for any other purpose, to act otherwise than provisionally in accordance with this act, until such Company shall have obtained a certificate of complete registration as hereinafter provided; and no joint-stock Com-

pany shall be entitled a certificate of completion unless it be formed by deed or writing under the seals of the subscribers therein; and in or by the deed or writing there must be appointed more than three directors, and more than three auditors; and the deed or writing must set forth in a schedule to, in a tabular manner, to the order hereinafter made, the following particulars, to wit, 1. The name of the proposed Company; and also, 2. The business or purpose of the Company; and also, 3. The principal place for carrying on the business, and every branch thereof (if any); and also, 4. The amount of the proposed capital, and the means by which the same shall be raised; and where the same shall not be money, or shall consist entirely of money, the nature of such capital, and the value thereof shall be set forth; and also, 5. The amount of the capital (if any) to be raised, and the manner in which it is to be raised; and also, 6. The total amount of the capital subscribed, or proposed to be subscribed, at the date of the deed; and also, 7. The names of the holders of the capital (if any) in shares, and the number of shares, each of which shall be distinguished by a separate number in a regular series; and also, 8. The names and occupations of the directors, and (except bodies corporate) the places of residence of a

In the course of the argument, the following cases were cited:—*Richardson v. Larpent* (a), *Wallworth v. Holt* (b), *Evans v. Stokes* (c), *Deeks v. Stanhope* (d), *Richardson v. Hastings* (e).

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The VICE-CHANCELLOR (without hearing the other side). —In this case, the failure of the demurrer for want of equity is too manifest to require remark. The only other ground of demurrer alleged, is the want of parties. The bill states various circumstances, whereby misconduct is imputed to the persons to whom the whole scheme, and the steps towards the perfection of that scheme, were entrusted. It alleges that improper acts, or acts of such a nature or to such an extent improper as to render it impossible to pursue the scheme, have been done. It also alleges, besides the matters of detail to which I have alluded, that the monies of the plaintiff, and of the other shareholders on whose behalf the plaintiff sues, have been obtained by fraud and misrepresentation, and for a purpose which has wholly failed. The latter part of the record runs thus: “Charges, that the number of shareholders in the said London and Manchester Direct Independent Railway (Remington’s line) is so great, and the rights and liabilities of the shareholders are so subject to change and fluctuation, by death and otherwise, that, save as herein stated, plaintiff does not know, and is totally unable to discover the names of the other shareholders; and,

subscribers, according to the information possessed by the officers of the Company in respect of such names and occupations, and places of residence; and also, 9. The number of shares which each subscriber holds, and the distinctive numbers thereof, distinguishing the numbers of the shares on which the deposit has been paid from those on which it has not been paid; and also, 10. The names of the then direc-

tors of the Company, and of the then trustees of the Company (if any), and of the then auditors of the Company, together with their respective places of business (if any), occupations, and places of residence,” &c.

(a) 2 Yo. & Coll. 507.

(b) 4 My. & Cr. 619.

(c) 1 Keen, 24.

(d) 9 Jur. 331.

(e) 7 Beav. 301, 323.

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even if plaintiff were able to discover their names, it would not be possible, without the greatest inconvenience, to make them parties to this suit, and so to do would render it impossible to bring this suit to a hearing. Charges, that the interest of the said shareholders, except the said defendants, are identical with those of the plaintiff in respect of the matters herein stated, or in respect of the property of the said Company and the surplus thereof; and all the said shareholders, other than the said defendants, are fully represented by the plaintiff, and have a common interest in the relief hereby prayed." As to the inability to discover the names of the shareholders, I consider that so much of the charges as I have read, must, for the present argument, be rejected, by reason of the late act of Parliament, referred to by counsel, for the Registration of Joint-stock Companies. I think that the allegation of ignorance is one that must be rejected; but that the allegation with respect to the number of shareholders remains; and although there may possibly be a case in which the latter allegation would be too vague and loose, yet, when it is considered as applying to so great a number of persons as those now in question, it does not appear to me too wide or vague. With regard to the latter part of these charges, I am of opinion, that, as the case stands on this record, the principle which one of our greatest judges laid down, and upon which he acted in *Cockburn v. Thompson* (a), renders it necessary for me to overrule the demurrer for want of parties. It is not, however, positively necessary (although it was formerly the rule of the Court, or, at all events, more generally practised than it is at present or has been of late years), where the question is one of any nicety or difficulty, to pronounce a final or conclusive opinion; but if the Court sees that it is a matter of difficult argument or reasonable discussion, it may, and often does, overrule the demurrer, saving the benefit of the question raised by it until the hearing of the cause, or, in other language, without prejudice to the question. That is the course I propose to take in

(a) 16 Ves. 321.

this case, (viz.) to overrule the demurrer without prejudice to any question in the cause, reserving the costs, unless the plaintiff can shew they ought to be disposed of now.

Demurrer overruled without prejudice, and the costs, plaintiff submitting, reserved.

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BEFORE THE LORD CHANCELLOR (a).

SHARP v. DAY and Others.

May 27th,
June 2nd, &
Nov. .

THE bill in this case was filed, on the 8th April, 1846, by W. Sharp, on behalf of himself and all other persons interested in the matter therein mentioned as partners in the partnership or Company called "The East Riding Junction Railway Company," except such of the said partners as were thereafter named as defendants thereto, against W. B. Day, J. S. Richardson, J. Torr, W. N. Depledge, W. Stead, W. Briggs, and T. Newmarsh, and J. Bennett, G. Cammell, and C. West; and it stated, that, in the month of October, 1845, the defendant Day, together with W. R. G., J. T., and F. W. H., and others, formed and promoted a plan to establish a Company, to be called "The East Riding Junction Railway Company," for making a railway, to commence at Great Driffield, and to terminate at Melton; and that the defendants caused a prospectus to be printed and published, stating the benefits proposed to be derived from such rail-

A Company was formed for making a projected railway; but before any shares were allotted, or deposits paid, the majority of the provisional committee determined to abandon the project, and a resolution was passed, that each member of the committee should pay £30 to defray expenses incurred.

One of the provisional committee, who had not contributed, filed his bill, on behalf of him-

self and all other parties interested as partners in the Company, except the defendants, against ten of the provisional committee, who had been appointed the audit committee of the Company, for an account of the monies and property, and the debts and liabilities of the Company; and also for a receiver, and injunction against all the defendants; and also an injunction against one of the defendants, who had acted as secretary to the Company, to restrain him from prosecuting an action brought by him against the plaintiff for a debt alleged to be due to him from the Company.

To this bill the defendants demurred, for want of equity and for want of parties generally; and particularly, because all the persons who had contributed monies on account of the said undertaking, and also because all the members of the provisional committee had not been made parties.

Held, by Lord Chancellor, on appeal, that the demurrer, which had been overruled by Knight Bruce, V. C., should be allowed.

(a) Lord Lyndhurst.

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way, and inviting persons to subscribe thereto, and become members of the Company, which prospectus signed by C. P., solicitor.

That, within the week next following, a second prospectus, for the like purpose, was issued, with the sanction of the defendant Day, in which his name, and the names of the said J. S. Richardson, J. Torr, W. N. Depledge, W. Stead, W. Briggs, and T. Newmarsh, were, with their consent, published, together with the names of other persons, to the number of thirty-six, or thereabout, as forming the provisional committee for promoting the said railway: and it was thereby stated, that the said Company had been provisionally registered; that the capital thereof would consist of £350,000 in 17,500 shares of £20 each; that a deposit of 2*l.* 2*s.* per share would be required; that considerable benefits therein specified would result from the undertaking; and that the subscribers would be held liable only to the extent of their first deposit until an act of Parliament should be obtained, and afterwards only to the amount of their subscriptions; and that application for shares in the form thereto adjoined might be addressed to C. P.

That advertisements similar to the prospectuses were published from time to time in divers newspapers in London and in the country respectively, and especially in Kingston-upon-Hull; and that therein the names of the defendant W. B. Day, and of the seven first-named defendants, were respectively published as members of the provisional committee, so soon as they became members thereof.

That the plaintiff was applied to by the aforesaid defendants, and requested to join in and promote the undertaking, and to become a partner therein, and a member of the provisional committee; and that, relying on the statement contained in the prospectuses and advertisements, and on statements to the like effect made to him at the time of such applications, and on the defendants being and continuing such partners, and confiding that he would not be or be held liable further or otherwise than as in the prospectuses and

advertisements mentioned, he, on or about the 9th of October, agreed so to do, and accordingly his name was, on the day next following, and afterwards, advertised as one of the provisional committee, together with the aforesaid defendants.

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That, soon afterwards, J. Bennett, G. Cammell, and C. West became, and had ever since continued, and then were, partners in and promoters of the undertaking, and members of the provisional committee; and that, in October, the defendant W. B. Day was requested by the provisional committee to undertake the duties of secretary *pro tempore* of the Company; and having acceded to that request, he was thereupon appointed by the same committee accordingly, and had ever since acted in such capacity; and no permanent secretary had ever been appointed; and no salary or payment was fixed or asked for, or intended to be demandable, in return for the services of the said W. B. Day as such temporary secretary.

That applications were made by many persons for shares in the said undertaking, but no shares had theretofore been allotted to any such applicants, or to plaintiff, or to any member of the provisional committee; and that the plaintiff, after he became a member of the provisional committee, attended some meetings thereof.

That plans and sections were made, and other works done, for the purpose of carrying the said undertaking into effect; and that, in December, 1845, a meeting of the provisional committee was held, pursuant to notice, for the purpose of discussing the best steps for furthering the interests of the Company; and at such meeting it was proposed and seconded, and, after much discussion, resolved by a majority of eight members thereof, that the undertaking should be forthwith brought to a conclusion, and the expenses incurred in bringing it to its then present position should be immediately ascertained, and the *quota* of such expenses paid by each member of the provisional committee; and that the secretary should be instructed to

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write as soon as possible to every member of the provisional committee, with a request for the immediate payment of the sum of £10 into the bank of &c., to the credit of certain persons there named as trustees for the audit committee, a primary instalment towards the liquidation of the above mentioned expenses; and that the defendants J. H. Richardson, J. Torr, W. N. Depledge, J. Bennett, T. Newmarch G. Cammell, C. West, W. Stead, and W. Briggs should constitute such audit committee, to which they accordingly consented.

That W. B. Day, as such secretary, wrote to the several members of the provisional committee a letter, together with a copy of the resolutions of December; and thereby requested them respectively to pay the sum of £10 each in accordance with such resolutions: and that certain sums of money were paid, pursuant to and for the purposes of the said resolutions, to the account of the persons named as trustees, but they never accepted and never acted in the trust proposed to be placed in them; and the sums of money were shortly afterwards withdrawn from their account, and paid or transferred to or for the use of the defendants, in trust for or towards the liquidation of the liabilities of the partnership or Company.

That, in December, a meeting of the provisional committee was held, at which plaintiff was not present, and at which the audit committee delivered their report; whereby it appeared that the total liabilities of the Company amounted to 1545*l.* 3*s.* 4*d.*, and no more; and it was thereupon resolved by the meeting, that each member of the provisional committee should be called on to pay, as his *quota*, £30, on or before the 8th January then next, to the credit of three of the defendants, who were thereby authorised to discharge the bills passed by the committee. That, at that time there had been, and then were, eighty-three persons, or thereabout, members of the provisional committee; and that the sums which by the resolutions they were called on to pay amounted in the whole to £2490

being a sum unnecessarily large and very much more than was requisite to pay the sum of 1548*l.* 3*s.* 4*d.*, which formed the total of the liabilities of the Company.

That, in compliance with the resolutions, divers sums of money had been paid to the defendants in trust for discharging the debts and liabilities; and that the defendants had possessed themselves of other property of the Company applicable to the discharge of the liabilities thereof, and had thereout discharged all the liabilities of the Company, except £220, or thereabout, which was alleged to be due from the Company to their solicitor, C. P., and the sum of £45, claimed by the defendant W. B. Day.

That the defendants had, out of the monies so paid to them, set apart the sum of £220 for payment of the sum so alleged to be due to C. P., and, in addition thereto, then had in their hands the sum of £340 and upwards, the residue of the monies which had been paid to them, pursuant to the said resolutions, in trust as aforesaid, and of the other property possessed by them, and which sum was applicable and more than sufficient for the discharge of the said sum of £45, alleged to be due to the defendant W. B. Day, and of all other the liabilities (if any such there were) of the Company; and, under the circumstances, plaintiff had declined to pay to the defendants the sum of £30 mentioned in the aforesaid resolutions; but that he had always been and was then ready and willing to pay whatever was fairly and justly payable by him as his just contribution towards the discharge of the liabilities of the partnership or Company; and that he had, by himself and his agents, applied to and requested the defendants duly to pay and apply the trust monies then in their hands in discharge of the debt so alleged to be due to W. B. Day in case the same was in fact due, and in discharge of the liabilities of the Company then remaining unsatisfied (if any), and to ascertain the sum which would be fairly payable by the plaintiff as his contribution towards reimbursing the parties who had advanced the monies which had been paid pursuant

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to the resolutions, and to inform plaintiff of the names and addresses of the persons who had advanced the same, and whom plaintiff's contribution ought to be paid; but defendants refused so to do, and continued to pay and apply the monies and property so in their hands upon the trusts aforesaid for purposes inconsistent with the trusts, and, in particular, for the purpose of making presents and gratuities to the engineer employed by the Company, and divers other persons, and for carrying on the action at law therein mentioned.

That, in consequence of the plaintiff having declined to pay the said sum of £30 to the said defendants, the defendant W. B. Day did, in February, 1846, acting in concert with the other defendants, commence an action at law against the plaintiff, and filed his declaration thereon on the 14th of the same month, and thereby alleged that plaintiff was indebted to the said W. B. Day in £200, for the wages and labour alleged to have been done for the defendants and at his request, and for money therein alleged to have been paid by him for the use of plaintiff, and at his request, and for money therein alleged to have been found due and owing from plaintiff to the said W. B. Day, on an account before then stated between them; and therein alleged damages to amount to £200.

That the defendant W. B. Day, acting in concert, and with the knowledge, consent, and approbation of the other defendants, required plaintiff to plead forthwith to the declaration; and, plaintiff having accordingly pleaded the general issue, the said W. B. Day proceeded to trial of the action on the 20th March last, at York; and at such trial a verdict was given for the said W. B. Day for £48, with leave to plaintiff to move the Court of Queen's Bench to enter nonsuit.

That plaintiff never was indebted to W. B. Day in any sum or sums of money mentioned in the bill of particulars, or in any sum or sums of money for the matters therein mentioned, or for the matters in the action mentioned, otherwise

than as a member of the partnership or Company, if he was or ever had been so indebted as such member, which he did not admit; and that the said sums claimed by W. B. Day, if due, were due from the partnership or Company collectively, and not from the plaintiff only; and that the same were payable out of the trust monies in the hands or disposition of the defendants.

That W. B. Day sometimes pretended that he had no control over the monies, and could not obtain payment thereout; and that he had ceased to be a member of the provisional committee when he undertook the duties of secretary; and that such duties were inconsistent with his continuance as a member of such committee; and also, that he had ceased to be a member of the partnership or Company: and the bill charged, that W. B. Day was then a member of the partnership or Company, and that he then was and never ceased to be a member of the provisional committee, notwithstanding he undertook the duties of secretary, and that he had acted and still acted with the other defendants in the disposal of the monies; that such duties of secretary were not inconsistent with his continuing a member of the committee: and, as evidence, the bill charged, that the last-named defendant, from the 1st October, 1845, acted as such secretary at the same time that he acted and was advertised as a member of the committee; and that he had by his particulars of demand claimed to be entitled to be paid as secretary from the 1st October, and his name was published as a member of such committee after the 1st October, when he was appointed secretary; and that, at a meeting of the provisional committee, held on or about the 2nd February then last, it was alleged, in the presence of W. B. Day, and not denied, that he was, as a committee-man, bound to contribute towards the expenses, according to the resolutions, together with the other members of the committee.

That W. B. Day never had been discharged from the

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committee, and that there was no notice in the books of the Company of his having ceased to be a member of the committee; and plaintiff never consented to W. B. Day ceasing to be a member of the committee or a partner in the Company: and that such action had been commenced and prosecuted by W. B. Day, at the instigation and with the sanction of the other defendants, and in concert with them, in consequence of plaintiff having declined to pay the said sum of £30, and in order to harass and vex plaintiff for so declining, and with a view indirectly to compel him to pay the same.

That W. B. Day and the other defendants well knew and admitted, as the fact was, that, in case the amount so claimed by him was due, the same was due from the Company and not from plaintiff individually, and was payable out of the monies in the hands and at the disposal of the defendants; and, as evidence thereof, plaintiff charged, that W. B. Day, some time previous to 2nd February, 1846, presented to the audit committee, on behalf of the Company, his bill for the several matters and things in respect of which, in his action and bill of particulars, he claimed payment from plaintiff, amounting to 74*l.* 10*s.* 6*d.*; and that his bill, so delivered to the committee, was directed to the audit committee, and W. B. Day then claimed that sum as due to him from the Company, and the bill was thereupon examined by the audit committee, and 29*l.* 10*s.* 6*d.* was deducted therefrom, and the residue of the demand was allowed as due from the Company and payable out of the monies at the disposal of the defendants, under the several resolutions; and thereupon a memorandum was written at the foot of the bill, as follows:—"We have audited and allowed this account at £45, which sum now remains due to Mr. Day. Hull, Feb. 2nd, 1846;" which memorandum was at the same time signed by the defendant J. T. R., as chairman of the committee, and by the defendants J. T. and J. B.; and immediately afterwards the defendant W. B. Day wrote and signed at the

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foot of the memorandum another memorandum, as follows :
 —“Hull, Feb. 2nd, 1846.—I hereby consent to accept £45
 in full discharge of this account.”

That the defendants J. S. R., J. T., W. N. D., W. S.,
 W. B., T. N., J. B., G. C., and C. W., acting in concert
 with the defendant W. B. Day, had employed C. P., the
 attorney and solicitor of the Company, as the attorney to
 prosecute the action, and that they had made themselves
 liable to pay him the costs of the same, and had applied for
 such purpose part of the trust monies and property come to
 their hands as aforesaid; and that they intended to apply
 further parts of such monies for the further liquidation of
 such costs, and also intended to pay thereout the demand
 of the defendant W. B. Day, in case he should not succeed
 by his action in enforcing payment thereof from the plaintiff.

That, in manner aforesaid, and otherwise, defendants had
 wasted and were wasting the monies held by them in trust
 for payment of the liabilities of the partnership or Company;
 and that they intended further to misapply the same; and
 that they ought to be restrained from paying or applying
 the same, or any part thereof, for any purpose other than
 the discharge of the debts and liabilities of the Company;
 and that W. B. Day ought to be restrained from further
 prosecuting his action, and from commencing or prosecuting
 any other action or suit against plaintiff, in respect of his
 alleged demand.

That defendants sometimes admitted that the sum claimed
 by the defendant W. B. Day was due from the Company
 partnership; but then they alleged, that they the defend-
 ants were not liable to pay the same or any part thereof,
 and that they had not any monies applicable to such pay-
 ment or to any part thereof; and that they had no monies in
 their possession or power belonging to or subsisting for the
 purpose of the Company or partnership, or available for the
 purpose of discharging the liabilities thereof.

The bill further charged, that defendants had received,
 and had or ought to have had in their power and at their

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disposition, property of the partnership or Company, and monies subsisting, for the purposes aforesaid, more than sufficient for such purposes, and that they ought to set forth account of all and every sums and sum of money which they had received by virtue of the resolutions, or in any way belonging to the partnership or Company, or applicable for the purposes, or for the discharge of the liabilities thereof, and also an account of the manner in which they had applied the same, and of the balance then in their or any of their former power or disposition; and also an account of the debts and liabilities of the Company or partnership.

That the members of the provisional committee were eighty-three in number, or more, and that there were many persons other than plaintiff and the defendants who were partners in this Company or partnership, but that the plaintiff was unable to set forth who such person or persons respectively were, and that, if known, they were too numerous to be made parties.

The bill, after the usual charge as to correspondence books, papers, &c., prayed that an account might be taken of all monies and property belonging to the Company or partnership which had come to the hands of the defendants &c., in trust for the partnership or Company, and of all and every sums and sum of money which, by virtue of the several resolutions, or of either of them, or otherwise, had been paid to or possessed by the defendants, or &c., for the purpose of discharging the debts and liabilities of the partnership or Company, or any of them, or applicable for such purposes, and of the application thereof respectively; and that an account might be taken of the debts and liabilities of the partnership or Company then remaining unsatisfied and that the outstanding property of the Company or partnership might be collected and applied, under the direction of the Court, as far as the same would extend, in or toward the discharge of such debts and liabilities; and that, if necessary, a receiver might be appointed for the purposes aforesaid; and that the defendants might be restrained from co

lecting or receiving the property or monies of the Company or partnership, or any part thereof, or from interfering therewith, and from applying or disposing of the monies or property thereof then in their possession or power, or monies paid or subscribed, or which might thereafter be paid or subscribed, in consequence of the resolutions, or of either of them, otherwise than under the direction of the Court, in discharge of the debts of the Company, and for the purposes for which such monies should have been so paid and subscribed, or come to their possession or power; and that the defendant W. B. Day might be restrained from prosecuting the action at law, and from commencing or prosecuting any other action or suit against plaintiff, touching the matters therein mentioned.

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To this bill the defendants demurred for want of equity; and further, because the several persons who had paid monies on account of the undertaking, and all the members of the provisional committee, had not been made parties; and further, for want of parties generally.

Mr. *Wigram* and Mr. *Follett*, in support of the demurrer.

Mr. *B. Parry* and Mr. *Kenyon*, contra.

The VICE-CHANCELLOR.—In this case, the bill may, I think, be understood to allege, that the defendants are in possession of funds, in effect as trustees, for purposes in the fulfilment of which the plaintiff and other persons are interested; (these persons are so numerous as to render the junction of them individually in the suit substantially incompatible with its prosecution); and that the defendants have acted, and intend to act, in contravention of those purposes, and it prays relief on that footing. Whatever I may think of the wisdom of instituting such a suit as upon the face of the bill this appears to be, and assuming the professed objects to be the true ones, I am apprehensive, that, if I allow the demurrer, I shall introduce a new rule, or rather alter an old one, by making it more strict.

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There seems to be enough in the bill to enable me to say that it is not born dead, but whether it is likely to enjoy a long, prosperous, or easy life, is another question. It is not without doubt that I hold the bill in the present stage to be sustainable; nor is the question of the applicability of the principle in *Richardson v. Larpent* (a) the only ground of doubt; but doubting, I must allow the plaintiff to call for answers. Let the demurrer be overruled, without costs, and without prejudice to any question in the cause.

The defendants appealed.

Mr. *Bethell* and Mr. *Follett*, in support of the appeal—In this case there was no issue of shares, and, consequently, no subscriptions and no partnership fund. The provisional committee were eighty-three in number, and having, as they supposed, incurred a personal liability in respect of some expenses in forwarding the scheme, some of them subscribed together a sum of money to meet those liabilities. A trust was created as to those only who contributed, but the plaintiff in this case, never having subscribed, had no part in the fund or the mode of distributing it: *Garrard v. Lord Lauderdale* (b). There is no allegation in the bill, that a Company was actually formed; and, therefore, it cannot be urged that any partnership existed. This was only an association with a view to an intended partnership: *For v. Clifton* (c), *Wood v. Duke of Argyle* (d). If no case of partnership is stated on the bill, then the allegation as to the existence of partnership property must fall to the ground.

There is no statement in the bill to shew that it was impossible to bring all the members of the provisional committee before the Court, nor any to shew that one of the subscribers to the fund is before the Court; and yet it asks that the fund subscribed should be distributed; but the Court will not meddle with a fund in the absence of the parties by whom and for whose benefit it was subscribed.

(a) 2 Yo. & Coll. 507.

(b) 3 Sim. 1.

(c) 6 Bing. 776.

(d) 6 M. & G. 928.

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it even if the Court consider this a partnership, all the partners must be parties, for the bill has for its object the dissolution of a Company; and this rule is only relaxed where relief is sought by one partner against others in the contemplation of a continuance of the Company: *Long Yonge*(a), *Richardson v. Hastings* (b), *Richardson v. Larret* (c), *Hichens v. Congreve* (d), *Wallworth v. Holt* (e). The relief sought by the bill must be clearly shewn, and any doubt about the nature of that relief ought to induce the Court to allow the demurrer. In addition to the other inconsistencies in this bill, the plaintiff in this case finds fault with the amount of money subscribed as being greater than the circumstances warrant, and yet he prays that that sum should be distributed;—he does not subscribe, and yet he acts on behalf of himself and other persons who have subscribed; and, in fact, seeks to represent persons not in the same interest with himself, which the Court will not allow: *James v. Garcia del Rio* (f).

Mr. B. Parry and Mr. Kenyon, contra.—This is clearly not an association as this Court always considers a partnership: *Holmes v. Higgins* (g). The fund was subscribed for the special purpose of paying all the liabilities of the Company, in which the plaintiff is clearly interested. This is the case of a *cestui que trust* calling upon his trustee to perform the trusts he has undertaken. Plaintiff was compelled to file this bill in order to get a defence to the action brought against him at law; and he alleges in his bill, that the defendants have other property besides the subscribed fund therewith to pay all liabilities of the Company. This allegation is sufficient to support the bill as to the first ground of demurrer. In the next place, this is not a suit

(a) 2 Sim. 369.

(b) 7 Beav. 301.

(c) 2 Yo. & Coll. 507.

(d) 4 Russ. 562.

(e) 4 My. & Cr. 619.

(f) Turn. & Russ. 297. See also *King of Spain v. Machado*, 4 Russ. 225.

(g) 1 B. & Cr. 74.

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for winding up partnership affairs, or for a dissolution of the Company, but for the proper application of a sum subscribed. It cannot be contended, in the face of the allegation to the contrary in the bill, that there is a collision of interest between the plaintiff and those whom he professes to represent; but it must be assumed, in the present argument, that he sufficiently represents those on whose behalf he sues. The charge of inability to set forth the names of all the parties interested, is sufficient to support the bill against the demurrer as to parties: *Wilson v. Stanhope* (a).

His LORDSHIP, after he had resigned the Great Seal, gave a written judgment, as follows:—

The parties composing the provisional committee in this case had incurred joint debts and liabilities to a considerable amount. They were also, independently of the subscriptions mentioned in the bill, possessed of joint property to some extent. It is so stated in the bill, and for the present purpose the statement must be taken to be true. The plaintiff complains that the defendants have possessed themselves of this property; that it is applicable and ought to be applied to the discharge of the joint debts and liabilities, but that the defendants intend to apply it to other and improper purposes. He prays, therefore, among other things, an account of this property, and of the joint debts and liabilities; and that the property may be applied in discharge of such debts, &c. It appears to me, upon this statement, that there is enough of averment in the bill to sustain it against a general demurrer for want of equity. But the bill goes much further. The plaintiff requires, not only an account of this property, but also of the fund subscribed pursuant to the resolution of the meeting of the provisional committee but to which he had refused to contribute. He complains of the intended misapplication of the money, and prays various matters respecting it. I cannot, however, under-

(a) Ante, p. 251.

stand by what right he claims to represent the subscribers to this fund, or to unite himself with them in a suit respecting it. The money was voted and paid upon the faith that all would contribute their proportion. This the plaintiff declined doing: he can have no right, therefore, to interfere with the fund, or to direct or control its application. It belongs exclusively to the subscribers: and if the plaintiff wishes to enforce any supposed claim with respect to it, he cannot, I conceive, do this by representing or uniting himself with them, but must proceed adversely against them, and in such a manner as to give them an opportunity of properly defending their rights.

The plaintiff is seeking to free himself from all liability at the expense of, that is, out of a fund which belongs solely to the subscribers.

A principal object of the bill is to restrain further proceedings in the action at law brought by Day. The subscribers have no interest in obtaining this injunction, still less have they an interest in applying a fund exclusively theirs in discharge of the action.

I think, therefore, the record is improperly framed in respect to the parties, and the demurrer ought to be allowed. I feel the less difficulty in coming to this conclusion, as the Vice-Chancellor rested his judgment principally on the doubts which he entertained when the case was before him.

BEFORE V. C. KNIGHT BRUCE.

Ex parte BASS, re Sir GEORGE STEPHEN and Others.

*July 4th, 7th,
8th, and 9th.*

THIS was the petition of M. T. Bass, a member of the committee of a projected railway from London to Manches-

A petition, presented by a member of the provisional

committee, in order to compel a solicitor, who had received a gross sum of money, under an agreement, in full of all demand, from the acting committee, to deliver a bill of his costs, fees, and disbursements, for the purpose of having it taxed, ordered, under the circumstances, to stand over, without prejudice to any suit, with liberty to institute one, and with liberty generally to apply.

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ter, and was presented in the matter of an act, 6 & 7 V c. 73, (Attornies' and Solicitors' Act), and in the matter Sir G. Stephen, (Knt.), B. W. Hutchinson, W. Rogers B. B. Cobbett, R. H. Wilson, and J. Owen.

The object of the petition, as it appeared by the pra was, that the respondents might be ordered to deliver bill of costs, fees, and disbursements, claimed to be due to them in matters wherein they had been employed as solicitors of the London and Manchester Direct Independent Railway Company, the petitioner undertaking to pay them what might be found due upon taxation, and for a reference to the taxing Master to tax the bill, and for an account of all money received and paid by the respondents in account of the costs; that they might, in taking such account, be charged with the several sums of £2000, £18,000, £5000, and £5000, as monies which had been paid to or received by them on account of their costs; that the respondents might produce all deeds, &c., in their custody or power relating to the bill, or to any of the items or charges, and might be examined upon interrogatories touching the same; and that, in case it should appear that such bill was overpaid, the respondents might refund what the Master should certify to have been overpaid.

The petition, after stating the formation and objects of Birmingham's Company (see ante, pp. 251, 252), further stated that the petitioner consented to take shares in the Company and to become a member of the committee, and signed a consent form, the agreement to take shares, the parliamentary contract, and the subscribers' agreement. By this agreement it was provided, that the directors, or any board or meeting, should have full power for carrying the undertaking into effect, and, for that purpose, to buy up and amalgamate with any railway made or projected, canal, branch railway, or tram-road, or other interest, and generally to adopt all such measures for the benefit and furtherance of the line as the board of directors, or the several committees of management constituted and authorised for that purpose.

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might in their judgment consider necessary and expedient. That the directors should have full power to appoint, suspend, or remove and re-appoint bankers, solicitors, engineers, surveyors, secretaries, clerks, agents, &c.; and that a deposit of 2*l.* 15*s.* per share should be paid by each subscriber at the time of executing the agreement. The petitioner was chosen a member of the committee on the 23rd of August, 1845; on the 21st November he bought thirty shares, upon which the deposit had been paid. The scrip was delivered to him, and continued in his possession. The respondents were appointed joint solicitors of the Company, and so continued until November, 1845, when they were discharged. Whilst they continued such solicitors, they were employed in taking journies, answering letters, preparing and ingrossing deeds and other documents, serving notices, and in transacting various other matters of business necessary to be done in the formation of the Company, and preparing to apply to Parliament, and as such solicitors possessed themselves of divers plans, deeds, books, papers, and writings belonging to the Company. In May, 1845, Rastrick's Company was formed. Early in October, in the same year, the acting committee of Remington's Company were desirous of effecting an amalgamation of the two Companies, and proposed to open a negotiation for that purpose. The amalgamation was strongly opposed by the respondents, some of whom, it was alleged, refused to afford any assistance in carrying it into effect, and differences arose, in consequence of this refusal, between the committee of Remington's Company and the respondents. The committee then entrusted the management of the preliminary arrangements for the amalgamation to J. Owen. The terms of the union of the two Companies were ~~usually~~ agreed upon by their committees on the 25th of October, 1845. The petition stated, that, by the terms of the ~~agreement~~ agreement between the two Companies, it was arranged that the committee of Rastrick's Company should abandon their ~~intention~~ intention of applying to Parliament for an act to authorise

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the construction of Rastrick's line, and that a joint committee of the two Companies should be formed, and the capital united. In November, 1845, the committee of Remington's Company were informed that the respondents intended, notwithstanding what had passed between the two Companies, and without the authority of the committee Remington's Company, to insert the requisite parliamentary notices. The acting committee immediately resolved that each of the solicitors should be requested not to insert such notices without their written authority, under the hand of the chairman of the Company. Three or four days afterwards, application was made by the solicitors, the respondents, for payments on account of their costs, although no bill had been delivered. The sum of £2000 was paid to the respondents, and they were requested to make out their claims against the Company up to the 1st of November inclusive, and to send them in, that the same might be examined and discharged. On the 13th of November all the respondents, except Mr. Owen, (as the petition alleged), caused the insertion of notices in the Gazette contrary to the resolution of the 4th of the same month whereupon the committee resolved, that, as the solicitors had disobeyed the orders of the board, and, "against the direct and explicit commands, had inserted notices of application to Parliament, the respondents, Stephen & Hutchinson, Wilson, Cobbett, and Rogers, should be dismissed from being the solicitors of the Company," and desired them to send in their bills with a view to their payment. The committee also gave them notice, that they would not pay any expenses incurred by the solicitors for printing and publishing since the 4th of November. Advertisements were issued, signed by Col. L. S., the chairman of the Company notifying to the public that the notices which had been given of an application, in reference to the London and Manchester Direct Independent Railway Company, had been issued against their express commands and contrary agreement. The resolution of dismissal was also advertised.

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It was alleged, that the defendants, being dissatisfied, threatened to file a bill for an injunction to restrain the committee of the amalgamated Companies from using the plans, sections, and other documents which they had in their possession, and which had been prepared for Remington's Company. It being necessary that the plans and sections, and parts of the book of reference, should be deposited at the office of the Board of Trade, and of the clerks of the peace for the several counties, on or before the 30th November, the committee of Remington's line, being apprehensive of a delay by which they might lose the next session of Parliament, applied to the respondents to withdraw their opposition, and deliver up the plans and sections upon payment of their costs. This the defendants agreed to do; but, as the petitioner alleged, they insisted upon being paid £28,000 in satisfaction of their bill of costs, exclusive of the costs of a Mr. Wilson and Mr. Owen; and the respondents, Stephen & Hutchinson, Rogers & Cobbett, promised, that, upon payment of the £28,000, they would remain neuter in all future proceedings, resign their office of solicitors, and deliver up all plans and papers in their possession. On the 18th of November, Messrs. S. & H., with the privity and approbation of Messrs. C. & R., (as was alleged), signed and sent to S., the chairman of Remington's Company, the following letter:—

“ Dear Sir,

“ Furnival's Inn.

“ On having our costs settled in the form proposed, we undertake to remain neuter in all future proceedings respecting the two Companies to Manchester, and also we resign our office as joint solicitor to the Direct Independent Railway Company; it being agreed that an advertisement shall be published in the daily papers, and at Manchester, acknowledging that our professional services to the Company have been of very great value, but, being adverse to the policy of the present board of management, we have resigned our office. On receipt of the said costs, we will

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deliver up to you all the plans and papers in our possession and shall be happy to assist you with any information in our power."

On the same day, Messrs. Stephen & Hutchinson signed and sent to the acting committee of Remington's Company the following document:—

"We undertake that Messrs. Cobbett & Rogers shall each give a receipt in full discharge of all costs due to them from the London and Manchester Direct Independent Railway Company, on the same terms as are contained in our letter of this day, addressed to the chairman, on receiving £5000 each, being £10,000 for the two."

A meeting of the members of the joint committee of the Companies was held on the 21st of November, and the committee then determined not to entertain the proposal at that time, and the question was postponed until the 24th of the same month. The petitioner stated, that, having received a letter from a member of the joint committee on the 22nd, he came up to London to attend the meeting on the 24th, at which he expected the assent or dissent to the proposition of Messrs. Stephen & Hutchinson would be given. On his arrival in London, he was informed, to his surprise, that five of the members of the acting committee of Remington's Company, who had been attending the joint committee, after they had retired from it on the 22nd, had drawn cheques for the purpose of discharging the accounts of Messrs. S. & H., £18,000; for Mr. Rogers, £5000; and for Mr. Cobbett, £5000. The cheques had been delivered to one of the members of the committee, and by him handed to Sir G. S. on the same day, when they were paid by the bankers of the Company. The petitioner stated, that he had been led to believe the cheques, although drawn, would not be handed to the respondents until a balance of costs had been delivered, and that more would not be paid to them than was justly due. A protest against the

payment was immediately entered by Colonel L. S., in these terms:—

“I do protest against giving Sir George Stephen, Messrs. Hutchinson, Cobbett, and Rogers, the enormous sum of £28,000, especially without the official consent of the amalgamated board to their portion of the account.”

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Another member of the committee concurred in the protest, as did also the petitioner. The respondents had not, at the time of receiving the cheques, given any receipts; but they did so on the 24th of November, when they gave the following memorandum:—

“It being fully understood that all claims and questions are this day finally settled, and for ever concluded, between us and the London and Manchester Direct Independent Railway Company, and we having severally given receipts in full of all demands upon this understanding, we promise to deliver bills of costs with all practicable speed, the delivery of them hereafter being one of the conditions of the settlement, and that settlement proceeding on the basis, that all differences, whether pecuniary or otherwise, are finally and amicably adjusted by payment of the sums which we have respectively received.

“November 22nd, 1845.”

The petition concluded by stating, that the respondents, although applied to by and on behalf of the acting committee for the delivery of their bills of costs, had not done so; whereupon the acting committee had resolved that legal measures should be taken to enforce the delivery of the bills and their taxation.

The affidavit of Sir. G. Stephen, in answer to the case made by the petition, was as follows:—“On the 24th of June last, I entered into partnership with B. W. Hutchinson, also a solicitor of this Court, and at the time of commencing such partnership, the said B. W. H. had purchased

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an interest as one of the joint solicitors in the London Manchester Direct Independent Railway Company, known as Remington's line, for a large sum of money. And I further say, that, by private arrangement between me and my partner, it was agreed that my partner should conduct and exclusively manage, all professional business that devolved upon us as joint solicitors in the said undertaking but in consequence of a communication made to me by the committee of the Company, that my personal assistance desired by them, I devoted myself to the same accordingly though with the co-operation and assistance therein of my partner. And I further say, that, at the time of my becoming connected with the Company as such solicitor, the undertaking was, for all practical purposes, in its infancy for though the scheme had been for some time before the public, the previous efforts for its establishment had proved fruitless, and the whole undertaking was in abeyance. And I further say, that the office of a solicitor to a Railway Company, and particularly in relation to its original establishment, is of a wholly different character from that of the ordinary office of a solicitor, and, both as respects the nature of the duties to be discharged, and the extent of the demands on the attention and energies of the solicitor, the employment involves almost the entire abandonment of all other business, and the consequential sacrifice both of pecuniary and connexion, involved in a long and continuous withdrawal from ordinary clients and their affairs. And I further say, that the mental as well as physical labour required, far exceeds that of ordinary professional demand, and is universally recognised accordingly as requiring a far higher scale of payment,—while the nature of the occupation excludes the application not only of the ordinary rate of remuneration of professional business, but even that of the scale of remuneration of itself, as an estimate of value; and, in fact, even with liberal remuneration for the labour bestowed in the original organisation of a railway undertaking, it is not in this, in the ultimate profit obtained in the carrying the un-

taking through Parliament, the conveyancing of the line, and the more permanent solicitorship to the undertaking, that the real return is to be found. And I further say, that, on my first attending the committee, I found that the members were, for the most part, inexperienced in matters of railway undertakings, and it gradually devolved on myself, to a considerable extent, both to suggest and prosecute the proceedings necessary to the establishment of the undertaking, which, it was allowed, had hitherto failed for want of competent management. And I further say, that, under the circumstances, I projected and advised the adoption of a plan for obtaining provincial support to the undertaking, by collecting public meetings at places most interested in the result, and of informing such meetings of the advantages likely to be derived to their respective trades. And I further say, that it was distinctly and in terms put to me by the then managing committee, whether I would be responsible for the management of such public meetings, and for addressing them when held, notwithstanding the powerful opposition which might reasonably be expected; and I assented to undertake such responsibility, provided that I was fairly supported by the committee. And I further state, that the committee, after due consideration, adopted the plan which I proposed, and instructed me to follow my own course for carrying it out; and I thereupon proceeded to many places in the north, in company with various members of the committee, for the purpose of collecting public meetings, and of addressing them, and meeting all opponents, it being arranged that my partner was to remain in London, to conduct more particularly the business of the Company requiring to be transacted in London. And I further state, that I was engaged upon this duty for a considerable period, to the entire neglect of all other professional and private business, and that I thereby lost, as I verily believe, much valuable connexion, and, particularly, appointments to other public bodies, of a permanent nature, of which I had received the promise,

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but which I was obliged to abandon, in consequence of my absence from London, and of my time being wholly monopolised by the duty which I had undertaken, while the time of my partner was equally occupied with the affairs of the Company in London, and the general business of our office was accordingly suspended. And I further state, that, by my advice, the said committee determined to conciliate a powerful opposition which had arisen against the intended railway on the part of the influential landed proprietors, by sending me to call on such proprietors, and to explain the views of the Company, and to answer such objections as they severally entertained; whereupon I did call upon all the influential landed proprietors, or upon their agents, on the line between Barnet and Macclesfield, and exerted myself with great success to overcome their objections, and to obtain their assent, and was engaged for several weeks in this duty. And I further say, that while thus occupied I discovered many important mistakes that had been committed by the engineers of the Company, in projecting the line and making the surveys; which mistakes, in one instance, involved physical impossibilities, and, in other instances, an interference with private property to an extent that excited great opposition, and would entail an immense pecuniary compensation; and I reported such errors from time to time to the acting committee, in consequence of which they were corrected. And I further say, that the value of my services in all those different departments was respectively recognised and acknowledged in most grateful terms by the managing committee, and that in several instances the members of the committee refused to prosecute their mission into the country unless I was present to bear the brunt of the contest. That, by an indenture, made, I believe, in or about the month of July, in the year 1845, between myself the said Sir G. Stephen, and the said B. W. Hutchinson, J. Owen, Wm. Rogers, R. H. Wilson, and R. B. B. Cobbett, of the first part; the said G. Remington, of the second part; H

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W. Matthew, of the third part; and the Hon. L. S., J. W., and J. J. K., on behalf of themselves and all other parties who were then, or thereafter should be, acting or elected to act as members of the provisional committee or board of directors of the said line of railway, to be called 'The London and Manchester Direct Independent Railway,' and intended also on behalf of themselves and all other persons who were then, or thereafter should be, acting as directors of the said line of railway, of the fourth part; and which was duly executed by myself and the said B. W. Hutchinson as I believe; after reciting that the said parties of the first and second parts had devoted a considerable portion of their time, and incurred divers expenses in preparing plans and making estimates of the probable cost of the said intended railway; and also in making the necessary inquiries and calculations for ascertaining the present state of the traffic along the course of the said intended line of railway, and the probable amount of the traffic and other sources of profit which might be expected to be available to the said intended line of railway; and also in preparing and printing advertisements and prospectuses, and in adopting other means for making the said intended line known to the public; and also in considering the stations, tunnels, embankments, branch railways or extensions, buildings, works, and conveniences connected therewith; and also reciting, that the said party thereto of the second part, had also incurred divers expenses in and about the premises, and in and about advertising the same, and in and about providing suitable places of meeting for the parties thereto; and also reciting, that it had been agreed by and between them the said parties thereto of the first and second part, that the said plans, estimates, and other materials and information should belong to and become the property of the said intended Company; and also reciting, that, at a meeting of certain gentlemen, acting as the provisional committee or board of directors of the said Com-

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pany, to be called 'The London and Manchester Direct Independent Railway,' it was resolved, in consideration of the said plans, estimates, and particulars as aforesaid, being so placed at the disposal of the said intended Company by the said parties thereto of the first, second, and third parts respectively; and also in consideration of other services thereafter to be rendered by them respectively to the said Company in their several capacities of solicitor, engineer, and secretary, that the said parties thereto of the first part should be appointed joint solicitors of the said Company on the said line of railway; the said G. Remington should be the engineer; and the said party thereto of the third part should be the secretary to the said Company. And thereupon, the resolution having been entered into, it was declared and agreed by them the said parties thereto of the first, second, and third parts respectively, that no person who might act as a promoter, member of the provisional committee, or as a provisional, or temporary, or permanent director upon the said railway, should in consequence thereof be rendered personally or individually responsible or liable to the said parties thereto of the first, second, and third parts, or either of them, for or in respect of any act, deed, matter, or thing whatever at any time theretofore made, done, or committed for or on account or in respect of the said line of railway called 'The London and Manchester Direct Independent Railway,' by them the said parties thereto of the first, second, and third parts, or either of them, or for or on account of any contract or liability which might have been incurred or entered into by them the said parties thereto of the first, second, and third part or either of them, to and with any person or persons whatsoever, or for any salary or other payment to be made to them the said parties thereto of the first, second, and third parts, or any of them, or for any service or services at any time thereafter to be rendered or performed by them.

said parties thereto of the first, second, and third parts, or either of them: It was witnessed, that, in pursuance of the said agreement, and in consideration of the premises, each of them the said parties thereto of the first, second, and third parts covenanted with and to the parties of the fourth part, for and on behalf of themselves the said parties thereto of the fourth part, and as trustees for and on behalf of themselves and any other person or persons whomsoever, who then was, or thereafter should be or become a promoter or member of the provisional committee or board of directors of the said intended railway, or provisional, or permanent, or other director or directors, shareholder or shareholders, of the said intended railway, to be called 'The London and Manchester Direct Independent Railway,' that they the said parties thereto of the first, second, and third parts, or either of them, their or either of their executors, administrators, or assigns, should not at any time thereafter sue out or prosecute any action, suit, or other process at law, whether by virtue or in consequence of the said appointment to act as solicitor, secretary, or engineer, upon or against all or any of the promoters or provisional committee of the said intended railway, or against all or any of the provisional or permanent or other director or directors, shareholder or shareholders, their or any of their executors, or administrators, or otherwise enforce any right, claim, or remedy which he or they severally or respectively had, or thereafter might have, upon or against all or any of the same several persons for or in respect of any claim or demand arising out of or accruing from any act, deed, matter, or thing, then or at any future time made, done, or committed, or to be made, done, or committed by them the said parties thereto of the first, second, and third parts respectively, as such solicitor, secretary, and engineer respectively.

The affidavit concluded with the following passage:—
 "And I further say, that I verily believe that the said M.

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T. Bass, in common with all the members of the said committee, acting upon the said committee, at the time perfectly well knew and thoroughly understood that the said payments of the said sums of £10,000, £5000, £5000, and £5000, so made to me and my said colleagues, were made bonâ fide, not on account of costs, nor in satisfaction of costs, nor subject to taxation of costs, nor subject to the repayment of the surplus, if any, but in excess of costs, (if it should be found that they did exceed fair and liberal costs), as a reasonable and just compensation to me and my said colleagues for services and sacrifices of great importance, ultra what our professional duty required, and for a compensation for the loss of our offices in the manner hereinbefore mentioned; and in which offices we had uniformly conducted ourselves in a manner to entitle us to the highest consideration from the scrip holders as well as the committee; and that the said committee, and the said petitioner, well knew that they could justify such payments had the said amalgamated railway eventually succeeded in obtaining their act; but that, from their failure, from circumstances over which we could have no control, it is now sought to shift such payment to the ground of costs, and save and except for such collateral purposes as are hereinbefore mentioned, merely to bring it within the taxing jurisdiction of this Honourable Court."

Mr. *Daniel* and Mr. *Speed*, in support of the petition, referred to the Attorneys and Solicitors Act, (6 & 7 Vict. c. 73, ss. 37, 38 (a)), and also to 7 & 8 Vict. c. 110; and

(a) Sect. 37 enacts, "That, from and after the passing of this act, no attorney or solicitor, nor any executor, administrator, or assignee, of any attorney or solicitor, shall commence or maintain any action or suit for

the recovery of any fees, charges, or disbursements, for any business done by such attorney or solicitor, until the expiration of one month after such attorney or solicitor shall have delivered up to the party to be charged there

ded, that, if the provisional committee had the power
r into this agreement with the solicitors, and to pay

r sent &c., a bill of such
arges, and disbursements,
ich bill shall be subscribed
ie proper hand, &c., and
e application of the party
ble by such bill, within
onth, it shall be lawful,
the business shall have
nsacted in the High Court
ery, or in any other Court
y, or in any matter of
otcy or lunacy, or in case
of such business shall
een transacted in any
f law or equity, for the
ligh Chancellor or the
of the Rolls, and in case
t of such business shall
en transacted in any other
or the Courts of Queen's
&c., or any Judge of either
, and they are hereby re-
ly required, to refer such
d the demand of such at-
r solicitor, &c., thereup-
taxed and settled by the
officer of the Court in
such reference shall be
without any money being
into Court; and the Court
e making such reference,
strain such attorney, &c.,
mmencing any action or
ching such demand, pend-
a reference;" [and in case
a application should be
ithin one month, the act
rs an order of reference
in conditions and terms,
o provides for taxation
elve months, under spe-
umstances, and for pay-
costs of taxation]: "Pro-

vided also, that it shall be lawful
for the said respective Courts and
Judges, in the same cases in which
they are respectively authorised
to refer a bill, which has been so
delivered, sent, or left as aforesaid,
to make such order for the deli-
very by any attorney or solicitor,
or executor &c., of such bill as
aforesaid, and for the delivery up
of deeds, documents, or papers in
his possession, custody, or power,
or otherwise touching the same,
in the same manner as has here-
tofore been done as regards such
attorney or solicitor, by such
Courts or Judges respectively,
where any such business had
been transacted in the Court in
which such order was made."

Sect. 38. "That, where any
person, not the party chargeable
with any such bill, within the
meaning of the provisions herein-
before contained, shall be liable
to pay, or shall have paid, such
bill either to the attorney or soli-
citor, his executor, &c., or to the
party chargeable with such bill
as aforesaid, it shall be lawful
for such person, his executor,
&c., to make such application for
a reference for the taxation and
settlement of such bill, as the
party chargeable therewith might
himself make; and the same re-
ference and order shall be made
thereupon, and the same course
pursued in all respects, as if such
application was made by the
party so chargeable with such
bill as aforesaid: Provided al-
ways, that, in case such applica-

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them for the services in which they had been employed, they only acted as trustees for the shareholders, who were entitled to have the bill for such services, and to have the same taxed. They had no power to release the solicitors from that to which all solicitors are liable, viz. the taxation of their bill. The agreement of the 22nd November, 1845, does not in any manner release the solicitors' bill from taxation, and therefore it cannot be so released by implication:

In re Smith(a), Balme v. Paver (b).

Mr. J. Russell, Mr. J. Parker, and Mr. Goodeve, for Sir George Stephen.—The whole question is, whether the bill of a person, who accidentally fills the situation of solicitor, for services not in themselves peculiar to solicitors, is liable to be taxed under the act? That act only contemplates the taxation of bills of costs for such work done and such services performed as can only be done and performed by solicitors. This is not a case in which the charges of a solicitor for business done in the ordinary course becomes matter of dispute. This is not an employment peculiar to solicitors: it might have been done by any one; and matters of this nature are not within the cognizance of the Court. The petition brings before the Court a state of things of great peculiarity and complication, which cannot be entered into on petition: *Re Rhodes(c)*. The only means of obtaining such a reference as is now sought must be by bill filed, in which all the parties interested in the monies

tion is made, when, under the provisions herein contained—a reference is not authorised to be made, except under special circumstances, it shall be lawful for the Court or Judge to whom such application shall be made, to take into consideration any additional special circumstances, applicable to the person making such appli-

cation, although such circumstances may not be applicable to the party so chargeable with the said bill as aforesaid, if he was the party making the application."

(a) 4 Beav. 309.

(b) Jac. 305.

(c) Antè, Vol. 3, p. 516.

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paid will be represented. The money paid to the respondents was not merely so paid for work and labour done, but was also the purchase-money for their interests in the right of proceeding to Parliament, and in the information and labour which had been obtained and incurred by the respondents previously to any Company being proposed. It was in fact a purchase by the solicitors of an appointment to an office. The petition makes out a case, that the committee were obliged to pay the solicitors this sum of money, in order to get the plans, &c., necessary to comply with the Standing Orders out of their possession; but this was denied by the affidavit of the respondents: *Re Whitcombe* (a). Another observation is, that the petition is not presented by one of the parties who had paid the money. but by a third party, who may or may not have any title. This case is not included in the 37th or 38th sections of the Attorneys and Solicitors Act. If a petition by any party can be maintained at all, it must be the petition of one or more of the shareholders on behalf of all: *Allen v. Aldridge* (b), *Becke v. Flower* (c), *Massie v. Drake* (d). The petitioner in this case may not be interested in the agreement entered into by the provisional committee. The payments may be good as between the solicitors and those who signed the cheques, although not good as against the shareholders. The Court cannot entertain this matter on petition. The title of the petitioner is far from being established: he is not an original allottee of shares, but a purchaser of scrip, and his title is very doubtful, if not bad: *Jackson v. Cocke* (e). The petitioner is not a party chargeable: *Re Barber* (f). The Court has no authority, upon petition, to give relief in a case where there exists a special agreement be-

(a) 14 Law Journ. (N. S.)
19, Ch.

(b) 5 Beav. 401.

(c) Id. 406.

(d) 4 Beav. 433.

(e) Id. 59.

(f) 15 Law Journ. (N. S.)
9, Exch.; 9 Jur. 976.

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tween the parties: *Alexander v. Anderdon* (a). And it has no jurisdiction except what it derives from the act of Parliament; and, under that act, it has no power to determine any question of contract as to costs: *Re Thompson* (b), *Re Murray* (c), *Ex parte Partridge* (d).

Mr. C. P. Cooper and Mr. Cairns for Mr. Rogers, insisted on the same points as those made by the counsel for the respondent Stephen; and also, that the work done, and the information acquired, was not done at the suggestion or by the order of any of the parties who afterwards became the committee of the Company, for the Company was not in existence until the registration on the 24th July, 1845. This was a contract for purchase of the produce of the labour and skill which the respondents had previously exercised. The Company became, under the subscribers' contract, a partnership; *Holmes v. Higgins* (e); but the petitioner was not one of the partners, and, therefore, had no right to intermeddle with the affairs of the partnership; he did not become a partner by the purchase of scrip, for no partner could part with his interest, except with the consent of the various members of the partnership, which would be in effect a dissolution of that partnership. *Walburn v. Ingoldby* (f), *Ellison v. Bignold* (g), *Blundell v. Winsor* (h). The partnership created by the subscription contract, can only be dissolved by deed: *Rackstraw v. Nuber* (i), *Doe d. Waithman v. Miles* (k). The petitioner does not represent all the shareholders, nor those persons who may claim to be repaid their deposits, by reason of the whole deposit-money not having been subscribed: *Pitch-*

(a) 6 Beav. 405.

(b) 9 Jur. 169.

(c) 1 Russ. 519.

(d) 2 Mer. 500.

(e) 1 B. & C. 74.

(f) 1 My. & K. 61.

(g) 2 Jac. & Walk. 503.

(h) 8 Sim. 601.

(i) 1 Holt, 369.

(k) 1 Stark. 182.

ford v. Davis (a), Nockels v. Crosby (b), Walstab v. Spottis-
woode (c).

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Mr. *Wigram* and Mr. *Willcock*, for Cobbett.

Mr. *Bacon*, for Wilson.

Mr. *Blunt*, Mr. *Chichester*, Mr. *Shee*, and Mr. *Matthew*,
for other respondents.

Mr. *Daniel*, in reply.—The relation of solicitor and client exists between these parties, for the petitioner is one of the committee-men by whom the solicitors are appointed. Although the persons themselves are freed from liability by the deed, yet the fund is liable; and the respondents claim a lien on that fund. This case is not different from that of a policy of assurance, on which actions are constantly brought against the directors, although they are not personally liable. The petitioner is clearly liable to the solicitor: *Parsons v. Spooner (d)*. The petitioner is a co-trustee of funds, out of which the demand of the solicitors has been satisfied, and he is to all intents and purposes one of the clients of the solicitors. Jurisdiction is particularly given to the Court in such cases; and nothing has been shewn by which that jurisdiction has been taken away from it in the present one.

The VICE-CHANCELLOR.—Several points have been made and argued, in support of this petition, upon which I do not consider it necessary, at present, to pronounce any opinion. They have, and indeed every part of the case has been exceedingly well argued by Mr. *Daniel*. It appears to me that there are very special and particular circumstances in this case; and, upon the facts to be collected from the ma-

(a) 5 M. & W. 2.

(b) 2 B. & C. 814.

(c) Post, p. 321; 10 Jur. 460.

(d) Ante, p. 163.

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materials before me, I think it, at least, reasonably a that the solicitors in this case had a fair ground for ing—as they appear, in effect, to have claimed, (on occasion of discussions that preceded and accompanied severance of the connexion between them and the sional committee)—to be entitled in honour, if not and by a moral, if not by a technical equity, to a compensation, or pecuniary advantage, independently of the fessional demands or their professional remuneration that such compensation or advantage thus claimed not fraudulently, agreed to be included and was included in the £28,000 paid to them. How this matter, in truth I give no opinion beyond saying, that I am not satisfied the claim was made dishonestly, or colourably, or frivolously. It may have been well or ill founded. It may be ought to be in some mode investigated; it may may not abide the test of investigation; there may have been some degree of pressure; but since the money paid to the solicitors, as it was, in full of all demands, without and without any knowledge of the mere amount claimed or due) is not, I think, proved to have been tainted by fraud, and was, as to an undistinguished known, and uncertain portion of it, paid upon a condition, which I am not enabled to estimate, but which that I am not, under this petition, authorised to pronounce dishonest or frivolous, it would, in my judgment, suffice that I were to order the delivery of a bill of costs, and direct its taxation, and that this operation should produce an amount short of £28,000, be impossible for the Court in this particular proceeding to pronounce judicially, in a suit, that the difference ought to be returned. I do not, therefore, I conceive, to do more upon this matter now at least, than to direct it to stand over, without notice to any suit, and with liberty to institute one if it should apply. Whether a suit against the solicitors, if instituted and being properly framed, would succeed, I

opinion, which I need not state. It struck me at one time that the Court might, under the present proceeding, lay hold of the written undertaking to deliver a bill of costs; but worded as that undertaking is, to order upon the ground of it the delivery of a bill for the purpose of taxation against the solicitor, would, I think, be wrong, if such order were not otherwise justified. Now, the avowed object of the present petitioner is taxation, in order that the solicitors may, if overpaid, be compelled to refund. I cannot treat the bill as being required for any other purpose than this. I have assumed, but I wish not to be understood as now deciding, that the petitioner, upon the alleged points of objection to his petition, and which I have not noticed, is right. The order, therefore, will be, that the petition do stand over, without prejudice to any suit, with liberty to institute one, and with liberty generally to apply.

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COURT OF EXCHEQUER.

In Easter Term, 1846.

RAWSTHORNE and Others v. GANDELL and Another.

April 15th.

THIS was an action by the provisional committee of a Company registered under the 7 & 8 Vict. c. 110, for making a railway, called "The Liverpool, Preston, and North Union Junction Railway, with extension to Blackburn, and branches to Southport and Wigan," against the defendants,

who, in the undertaking, executed to the defendants a release of the cause of action, the Court refused to set aside the plea, the releasor having a valid interest in the concern, and not being a mere trustee for others.

Where, in an action by the provisional committee suing on behalf of a railway Company, one of the plaintiffs, who held fifty

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two engineers, for the non-performance of a contract to survey the line, and furnish plans, &c., to be deposited in compliance with the Standing Orders of Parliament.

The action was commenced in January last, and having been joined, the cause was set down for trial at Liverpool Spring Assizes on the 21st of March. On the night of the 20th, the defendants withdrew the pleas on record, and delivered a plea *puis darrein continuance* for joint release, executed the day before by Duncan and Gaddall, two of the plaintiffs.

It appeared on affidavit, that, after their failure to deposit the plans by the 30th of November, according to the Standing Orders of Parliament, proceedings were taken upon at a meeting of the shareholders of the Company, at which resolution the releasors and all the original holders of the Company had notice. It was also resolved that one guinea per share of the deposit should be repaid to all shareholders desirous of giving up their shares. The releasor had been placed on the provisional committee of the Company under the influence of the defendants, but had never taken an active part in the management of the undertaking. He had presented 150 out of 200 shares which had been allotted to him, for the return of the guinea. After the action was commenced, he and another of the plaintiffs, and two other persons filed a bill in Chancery against the other plaintiffs, to have the accounts of the Company examined and to restrain this action. The bill was filed by the defendants' attorney, who also commenced a cross-action to recover an alleged balance due to the defendants. The releasor, and another releasor, had been on the managing committee of the Company, but was chosen from the provisional committee, but had taken no active part in their proceedings. He had returned and received back the guinea on all the shares which had been allotted to him; and had executed a deed, whereby, in consideration of that repayment, he did release and for ever claim unto the provisional committee of the Company

from all and all manner of actions, suits, reckonings, claims, and demands, both at law and in equity, which he could, should, or might have against the said committee by reason or on account of the said projected undertaking, or any transaction, matter, or thing, in anywise relating to the same, but subject to a rateable participation in any surplus fund.

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Upon these facts, *Crompton* now moved to set aside the plea, on the ground that the release had been executed and pleaded through collusion with the defendants, and in fraud of the other plaintiffs. That an individual member of a provisional committee of a Company had no power to destroy the rights of the whole body of shareholders by executing a release to a party sued by the Company through their provisional committee; that one only of the releasors had any interest in the undertaking, and that a very minute one, which he had fraudulently retained to defeat the action; but that even he, as a trustee, could only exercise his legal powers so as not to bar the rights of others who were also beneficially interested. That the release in this case was colourable only, and a clear case of fraud established, particularly in the case of Randall; and that the release being joint was tainted by the fraud of one of the parties to it. He cited *Phillips v. Clagett* (a), where *Parke, B.*, says: "Perhaps it may not be correct to say, that in all cases in which a party has an interest he may release. That is not, perhaps, correct. It is correct to say, that if he has parted with all interest, in that case he cannot release."

POLLOCK, C. B.—I think the Court cannot interfere in this case. One of the releasors certainly had no interest that would entitle him to release, but the other had. But we must not confound fraud with an improper act. There

(a) 11 M. & W. 84.

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is no doubt that this is an improper exercise of a right in a manner most mischievous and injurious to other persons for which the releasors may be responsible to another tribunal; but we cannot interfere if there is the smallest tittle of right or real interest on which the release may be founded in law. In *Phillips v. Clagett* (a), after the passage cited by Brother Parke explains his meaning. He says: "One of the cases cited was a case where the partner agreed with his co-partner that the latter should receive all the debts of the co-partnership, and pay the debts of the co-partnership. In such a case he has disposed of his right to release the debts, although he has an interest in the ultimate success of the business. I quite agree, that where a person under such circumstances executes a release to a party cognizant of the situation in which he stands, that is a case in which a Court of Equity would interfere, and it is a case in which this Court, in the exercise of its equitable jurisdiction, would interfere to prevent the defendant from pleading the release." If I am not suing altogether on behalf of other persons, and I am not a mere name, we ought not to interfere. This Court has no machinery for working out all the equities of conflicting and complicated interests, so that we cannot adhere to the law. This application is in fact an application of equity to discover whether Duncan is still interested in the undertaking.

PARKE, B.—Unless a clear case of fraud between the defendants and the releasors, to the prejudice of the plaintiffs, is made out, we cannot interfere to prevent the release.

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shares in a concern, however few, he has an interest which (however small it may be) is sufficient to give him a right to release. The case is very different from the familiar one of assignor and assignee, in which the Court have intervened in this way. Now a valid release by either Duncan or Randall would bar the action. Duncan has still fifty shares in the undertaking, and is therefore substantially interested, and entitled to release the claim of the Company against the defendants, subject to his responsibility to his co-partners for so doing. It is not shewn that he never agreed with the other plaintiffs not to release, so that his doing so was contrary to his bargain, and a fraud. It is shewn, indeed, that he agreed that the demand in this action should be enforced against the defendants in his name; but that cannot prevent his executing a release to them if he thinks fit to do so. In the ordinary case of two co-plaintiffs equally interested, if one of them, out of pure friendship for the defendant, release the action, the Court cannot on that account interfere to set the release aside. No such case is here made out as to induce us as a Court of law to interfere by virtue of our equitable jurisdiction. The remedy must be by a bill in equity to make Duncan responsible for his act in releasing the defendants.

ROLFE and PLATT, Bs., concurred.

Rule refused.

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April 18th.

MITCHELL v. NEWHALL.

A. gave an order to B., a stockbroker, to purchase shares in a foreign railway. There were no shares in the market, and B. bought a letter of allotment, it being the practice of the Stock Exchange at that time to buy and sell letters of allotment, as shares, in that railway. In an action to recover the value of the shares and the broker's commission:—

Held, that the question for the jury to determine was, whether the order to buy had reference to that which alone could be bought in the market at that time, or was an order to buy at a future time, when, by the passing of the foreign act, actual shares would be transferable and purchaseable.

THIS was an action of debt, brought by a stockbroker to recover £150, the value of fifty shares in the Eastern Junction Railway Company, and 2*l.* 10*s.* commission. The defendant pleaded that he was not indebted; on which issue was joined.

At the trial, before *Pollock*, C. B., at the Lord's Chamberlain's Rooms, in February, 1846, it appeared that the plaintiff stock-broker, was employed by the defendant, who was a stranger to the Stock-Exchange, to purchase for him shares in the Belgian Eastern Junction Railway Company. The plaintiff purchased a letter of allotment for that number of shares, and paid £150 for it. The defendant refused to accept the letter of allotment, whereupon this action was brought. At the time of the purchase there were no shares in the railway in question in the market, none being transferable until an act of concession should have been passed by the Belgian government. The secretary of the Stock-Exchange, and other persons conversant with its affairs, were called, and proved, that, with respect to that Company, letters of allotment were commonly bought and sold in the market as shares. It also appeared, that in that particular Company, no deed of subscription was required to be signed by the shareholders; and that it was stated in their prospectus, that no shares were to be transferred until a certain proportion of the capital should be paid up.

The Lord Chief Baron directed the jury to consider the order given by the defendant to the plaintiff, whether he was at once to purchase a letter of allotment, which on the Stock Exchange passed for shares, or whether he was to wait until the actual shares came out. The jury having returned a verdict for the plaintiff,

Humfrey now moved for a new trial.—The jury were misdirected. Although extrinsic evidence may be admitted to explain the language of a mercantile instrument, it is not so where clear and unambiguous words are used in a contract. The authority given to the plaintiff in this case was express, and free from all ambiguity, and therefore ought not to be qualified or explained away by evidence of an understanding on the Stock Exchange with respect to this particular Company, of which the defendant had no notice, and knew nothing; and such evidence ought not to have been received. An order to purchase shares in a railway is no authority to buy a mere letter of allotment, which, at the most, only gives the purchaser a right to shares contingent upon paying the deposit or signing the deed.

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POLLOCK, C. B.—I think there ought to be no rule in this case. The defendant cannot shelter himself under a supposed ignorance of the practice and mode of doing business on the Stock Exchange; for persons who employ members of the Stock Exchange to do business for them are bound by its rules. In this case, it was expressly proved by the secretary of the Stock Exchange himself, that letters of allotment like this were bought and sold there as shares in this Company. It is contended, that this evidence was not receivable, which might have been a good objection if this had been a case of a contract; but the question here was, what was the nature of the authority given by the defendant to the broker when he went into the market? The plaintiff received an authority to purchase something, and it was for the jury to say what that was.

ROLFE, B.—Undoubtedly it was a question for the jury to determine, whether the order to buy was not a direction to buy that which alone could be bought at the time, or whether it was an order that the plaintiff should buy at a future time, keeping this authority by him until the foreign

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act should be passed which would authorise the transfer of shares in this Company.

PLATT, B., concurred.

Rule refused (a).

(a) See the next case.

COURT OF EXCHEQUER.

In Trinity Term, 1846.

LAMERT v. HEATH.

The directors of the projected Kentish Coast Railway Company, having resolved not to issue scrip, some of the members, without their knowledge, issued scrip signed by the secretary from the office of the Company. This scrip found its way into the share-market, and was sold there at a premium. The plaintiff employed his broker to buy him some Kentish Coast Railway scrip, and the broker applied to the defendant, who sold him some of the above scrip. In an action to recover the price paid to the defendant, as having sold a spurious article:—*Held*, that the question for the jury was, whether the plaintiff intended to buy, and the defendant to sell that which was current in the market as Kentish Coast Railway scrip, or the real scrip of that Company.

DEBT for money had and received by the defendant for the use of the plaintiff, interest, and upon an account stated. Plea, never indebted.

At the trial before *Pollock*, C. B., at the London Sittings after Michaelmas Term, 1845, it appeared that the action was brought to recover the sum of 432*l.* 10*s.*, paid by the plaintiff to the defendant, a broker, for the purchase of 280 scrip certificates of the Kentish Coast Railway Company, which was a scheme projected toward the end of 1844 by a person of the name of Curling. The scheme was provisionally registered, directors appointed, advertisements inserted

The plaintiff employed his broker to buy him some Kentish Coast Railway scrip, and the broker applied to the defendant, who sold him some of the above scrip. In an action to recover the price paid to the defendant, as having sold a spurious article:—*Held*, that the question for the jury was, whether the plaintiff intended to buy, and the defendant to sell that which was current in the market as Kentish Coast Railway scrip, or the real scrip of that Company.

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in the newspapers, numerous applications made for shares, and a large number of shares allotted. As, however, very few deposits were paid at the London Joint Stock Bank, as requested, the directors passed a resolution that no scrip should be issued. Scrip certificates had been prepared in the usual form, with blanks left for the signatures of two directors; and some of the members who were dissatisfied with the resolution of the directors, in February 1845, issued some of the scrip certificates with the signature of the secretary instead of the directors, from the office of the Company, where the deposits were paid, as the scrip of the Company. These certificates, in March, were bought and sold in the share market at a premium, and were published in the Stock Exchange List. In April, the plaintiff's stockbroker bought the scrip in question from the defendant, who was a jobber on the Stock Exchange, in the regular course of business. No question arose as to the genuineness of this or any of the scrip till June, when the Board of Trade having reported unfavourably of the project, it was abandoned, and the Company dissolved. The directors then refused to return any of the deposits paid at the office, and repudiated the scrip issued on those payments, as done without their authority. The plaintiff, therefore, claimed his money back from the defendant, the scrip bought by him being of this description, and brought this action to recover it.

The Lord Chief Baron left the question to the jury, whether the scrip sold by the defendant to the plaintiff was genuine or not; and that, if they thought it was fictitious and fraudulent, their verdict should be for the plaintiff. The jury having found for the plaintiff for the full amount, *Martin*, in Hilary Term, obtained a rule nisi for a new trial, on the ground of misdirection.

Jervis, M. Chambers, and H. Hill, now shewed cause.—
The plaintiff is entitled to recover back the money which he

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has paid for a spurious article, as on a total failure of consideration. The proper question, therefore, for the jury was, whether the scrip sold was genuine or spurious. *Jones v. Ryde* (a), it was held, that a person who discounts a forged navy-bill for another who passed it to him with knowledge of the forgery may recover back the money had and received to his use, upon failure of the consideration; so a person who receives forged bank notes in payment may recover the money for them.

Martin and Willes, contra, were stopped by the Court

ALDERSON, B.—This rule must be absolute. The question for the jury was simply this—Did the plaintiff buy and the defendant sell that which was known in the market as Kentish Coast Railway Scrip? If so, what was the responsibility incurred by the defendant in selling this particular scrip? What was it that one party intended to buy and the other to sell as Kentish Coast Railway Scrip? If the only scrip of that name in the market was that issued by the secretary, as appears to have been the case, it ought to have been left to the jury to say whether the sale was intended to be of the real scrip or that which was current in the market as such. There must, therefore, be a new trial on the usual terms. I admit, if this were a forgery, if the name of the secretary had been forged, that would be a different case, the plaintiff desiring to buy a particular article and being supplied with a fictitious one.

ROLFE and PLATT, Bs., concurred.

POLLOCK, C. B.—I agree that there ought to be a new trial in this case. As to the liability of the jobber, that must depend on the result of the second trial. I am not av

(a) 5 Taunt. 488.

that that question has ever been fully discussed. It may be, that even if the direction to the broker were to buy what was current in the market, and that were spurious, it would not satisfy the order to buy, or at all events, the liability of the seller of the spurious article. That question is a very important one in such cases, and ought to be finally settled

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Rule absolute (a).

(a) See *Kempson v. Saunders*, 4 Bing. 5.

LAMBE v. SMYTHE.

May 8th.

THIS was an action to recover from the defendant, one of the directors of the Trinidad Great Eastern and South Western Railway Company, the sum of £13, for advertisements inserted in the Sunday Times newspaper. The defendant pleaded in abatement the nonjoinder of eight other directors as co-contractors. An affidavit verifying the plea, under the 3 & 4 Will. 4, c. 42, s. 8 (a), stated the residence of Sir George Rich, one of the co-contractors, to be at 43, Lowndes-street, Belgrave-square.

The 3 & 4 Will. 4, c. 42, s. 8, requires, that a plea of abatement for the nonjoinder of a co-defendant shall be verified by an affidavit in which the residence of such a person shall be stated with convenient certainty.—*Held*, that the word “residence” in this statute meant “home” or “domicile,” and therefore that an affidavit, stating the residence of A.

In Easter Term, April 25th, *W. F. Pollock*, for the plaintiff, had obtained a rule, calling upon the defendant to shew cause why the plea should not be set aside, on an affidavit which stated, that the plea was false as to the residence of one of the directors; that, at the time of the commence-

to be at a house, which, with the furniture, belonged to him, though it was then in the occupation of a friend till his return from abroad, where he was then travelling for a few months for the benefit of his health, sufficiently complied with the act.

(a) Which enacts, “That no plea in abatement for the nonjoinder of any person as a co-defendant shall be allowed in any Court of common law, unless it shall be stated in such plea that

such person is resident within the jurisdiction of the Court, and unless the place of residence of such person shall be stated with convenient certainty in an affidavit verifying such plea.”

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ment of the suit, Sir George Rich, who was one of the defendants, was not living at 43, Lowndes-street, but had left the house in the time, and had gone abroad; that the house in Lowndes-street was the property of a Colonel Austin, and was then in the care of a person who was endeavouring to let it. See cited *Wheatley v. Golney* (a).

Affidavits in answer stated, that the house in question was the residence of Sir George Rich, and that he was in fact, residing there at the time of the commencement of the suit, but had since gone abroad for a few months for the benefit of his health, and was endeavouring to have the house furnished until his return; that Colonel Austin was merely occupying it in the mean time, as the friend and visitor of Sir George Rich, to whom the house and furniture then and still belonged.

Jervis shewed cause (b).—The affidavit verifying in this case contains all the information intended by 3 & 4 Will. 4, c. 42, s. 8. The residence of Sir George Rich is stated with convenient certainty, which is all that the act requires.

Lush, contra.—The object of the statute was to enable the party pleading in abatement to give such information as would indicate the actual residence of the co-defendant, to enable the plaintiff to find him and serve him with process. There is nothing to shew that the defendant left the house with any intention of returning to it.

Cur. adv.

POLLOCK, C. B.—This was a motion to set aside the writ in abatement, on the ground that the affidavit did not disclose the true residence of a party who ought to have been served.

(a) 9 Dowl. 1019.

(b) May 6th.

joined. We are all of opinion, however, that the residence here stated was the true residence of Sir George Rich, within the meaning of the statute, which requires it to be stated on affidavit. The affidavits on which the rule was moved, no doubt, state that he was not living there at the time; but, when all the facts come to be inquired into, it appears that the house and furniture were in reality his, and that the statute has been complied with. The word "residence" used in it must be taken to mean a man's house. The rule must therefore be discharged, but without costs.

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PARKE, B.—"Residence" means "domicile" or "home," and this house appears to be that of Sir George Rich.

PLATT, B.—The language of the act, 3 & 4 Will. 4, c. 42, s. 8, at first led me to hold a different opinion; but, on looking into the cases decided before the passing of that act, *Newton v. Verbeke* (a), and *Taylor v. Harris* (b), I agree with the opinion of the rest of the Court. The statute seems to me to command that to be done which the Court before required to be done.

Rule discharged without costs.

(a) 1 Y. & J. 257.

(b) 3 B. & P. 549.

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May 23rd.

BARNETT v. LAMBERT.

A Railway Company having been formed, the secretary wrote to the defendant inviting him to be a member of the provisional committee, to which he wrote a letter of assent. His name was then published as one of the provisional committee, and he afterwards presided at a meeting of that committee. An action having been brought against him for the price of stationery supplied by order of the secretary:—*Held*, that the proper question for the jury was, whether the defendant, by assenting to join the provisional committee, had authorised the pledging of his credit for such things as were necessary for the use of that committee; and, therefore, that the jury were right in finding that he was liable for the stationery supplied after such consent.

THIS was an action of assumpsit for goods sold and delivered. Plea, non assumpsit.

At the trial, before *Pollock*, C. B., at the London Sittings after Easter Term, it appeared that the plaintiff, a stationer, had brought this action against Sir Henry Lambert, the defendant, as one of the provisional committee of the Great Welsh Junction Railway, to recover the price of stationery supplied to the order of the secretary of the Company. The Great Welsh Junction Railway Company was formed in June, 1845. At that time the defendant was not a member of the Company, but subsequently, on the 17th of July, in answer to a letter from the secretary inviting him to become a member of the provisional committee, he wrote a letter consenting to join that committee, but added, that he concluded his liability would be limited to the amount of his shares. On the 21st of August, his name was first published in the newspapers as a member of the provisional committee; and on the 15th of October, he presided as chairman at a meeting of the committee. The stationery, which was the subject of this action, was supplied at various times from June to December inclusive, but there was no evidence that the defendant knew anything of the plaintiff, or ever had any communication with him. The jury, under the direction of his Lordship, found a verdict for the plaintiff for the amount of those goods supplied after the 17th of July, the date of the defendant becoming a member of the provisional committee, leave being reserved to the defendant to move to enter a nonsuit, or to reduce the damages to such amount as the Court should think the defendant was liable to pay.

Quære, whether, on a division of the committee, an action can be maintained against one of the minority for goods supplied by the order of the majority.

Humfrey now moved accordingly.—The plaintiff ought to have been nonsuited. The defendant is not liable for any part of these goods; he made no contract for them himself, nor had the secretary of the Company, in law, or in fact, any authority to make one for him. [*Pollock*, C. B.—Does not the defendant's letter, agreeing to become a member of the provisional committee, authorise the meeting to pledge his credit?] These Companies are not like the case of a common ordinary partnership. There is no community of profit and loss, and the members do not authorise each other to bind them to an unlimited extent, certainly not beyond the money appropriated to the use of the committee. In *Todd v. Emly* (a), which was an action to recover the price of wines furnished to a subscription club, of the committee of which the defendants were members, where it was proved that the wine was ordered by the house-steward, who stated that he had authority to do so from the members of the committee; but it was not shewn that the defendants had interfered in the ordering of the wine, but merely that they were members of the general body of the committee; it was held, that the question for the jury was not, whether the defendants had held themselves out as personally responsible to the plaintiffs, but whether they, by the course of dealing, had individually authorised the making of the contract in the ordering of the wine. Lord Abinger, C. B., then said—"Supposing the jury to have been of opinion that the majority of the committee had a right to bind the minority, they might still think that the defendants had never done anything to shew that they concurred in the authority given to the house-steward; yet upon the general summing-up, they might come to the conclusion that the defendants were liable. . . . The question of the individual liability of the defendants does not appear to have been brought distinctly to the notice of the jury. As the case has been reported to us, we cannot say

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(a) 8 M. & W. 505.

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we see any proof that any member of the committee held himself out as personally liable to the plaintiff. *Alderson, B.*, adds, "The question is, whose agent was making the contract. The plaintiffs undertake that he is the agent of the committee, and they must make out that proposition. . . . In order to make the case out, and to establish the liability of the defendant, the jury should be satisfied that what was done was within the knowledge of the committee generally, and not it was within the particular knowledge of the defendant." These observations bear strongly on the present case, and shew that this defendant ought not to be liable with the expense of paying for goods in the warehouse in which he never interfered. [*Alderson, B.*—The principle of the previous case of *Fleming v. Hector (a)*.] That principle is distinguishable, and is not quite so favourable to the defendant; as there the defendant was not a member of the committee, but only of the club generally. Lord *B.*, said there: "I had thought, but without consideration, at the assizes, that these sort of institutions of such a nature as to come under the same view of partnership, and that the same incidents might be applicable to them; that where there were a body of gentlemen forming a club and meeting together for one common purpose, and one did in respect of the society bound the others, if he had been requested, and had consented to act for the society, the cases have been cited in the course of the argument, do not apply to societies of this nature. These transactions stand on a very different footing. They are not engagements in a community of profit and loss as partners. A partner has the right of property in the profits; the partners have a right in the capital; the contrary be clear, the defendant is not liable on his credit. . . .

me that it is impossible to interpret them so as to
 he committed the power of dealing on credit, even for
 purposes of the club." Here there is no partnership,
 community of profit and loss. Suppose the majority of
 committee outvoted the defendants and others in the
 ty, in ordering these goods, or the selection of the
 mer, the minority could not be said to be liable for the
 supplied by the person selected. [*Alderson, B.*—The
 lant would have to prove that. I do not say that he
 be liable in such a case; he gives no actual authority,
 could hardly be implied from his dissent. *Rolfe,*
 he case of *Tredice v. Bourne (a)*, seems to me con-
 against you. That was an action against a share-
 of a mining Company to recover the price of coals
 ed to the Company. The acts relied on to connect
 defendant with the directors (who were analogous to
 revisional committee in this case,) were certainly
 r than those proved here, but it was held that the
 ers of such a Company had authority by law (in the
 x of any proof of a more limited authority) to bind
 ther by dealings on credit, for the purpose of working
 mines, if that appear to be necessary or usual in the
 gement of mines. In *Todd v. Emly (b)*, the demand
 r wine, which was not necessary; here it is for sta-
 y, which was clearly necessary, as the committee could

without it.] Here the defendant, by his letter,
 responsibility to the amount of 100 shares. [*Al-*

—That is *per se*.] It is all events,

ity Secretary to the company. [*Pol-*

since the company had exceeded

induced all, is only

supplied attended the

as with over of 100

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then. The mere publication of his name in the newspaper as such could not make him one.

Jervis, for the plaintiff, stated, that he intended to move to increase the damages to the full amount, as there was an impression that *Alderson*, B., had decided at the last Chelmsford assizes, that a person who joined the provisional committee of a Railway Company made himself liable for all goods previously supplied to the Company. [*Alderson*, B., —I never decided any such thing.]

POLLOCK, C. B.—I am of opinion that no rule ought to be granted on either side, either to enter a nonsuit or to reduce or increase the damages. The goods supplied in this case may be divided into four parts: 1. Those supplied before the 7th of July, when the defendant consented to be on the provisional committee; 2. Those supplied between that and the 21st August, when his name was published in the newspapers as such; 3. Those between that day and the 15th of October, when he took the chair at the meeting; 4. Those supplied after his personal attendance on that day. Now, there can be no doubt at all, I apprehend, that he is liable in this action for the goods supplied after he attended that meeting, and acted as chairman of the committee. These goods were ordered in the usual manner of such Companies, that is, they were for the use of the provisional committee, for the purpose of commencing the operations of the Company. The defendant, when he attended, knew the stationery was in use by the committee, and as no funds had been raised or subscriptions made for such things, he must have known that they were obtained upon credit. I thought at the trial that he was not liable for any goods supplied before the 17th of July, when he consented to become a member of the provisional committee, but that he was liable for all supplied after that day, inasmuch as by that act he gave authority to the secretary to pledge his credit for such

things as were necessary to the committee as a body; and I am still of that opinion.

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ALDERSON, B.—I am of the same opinion. The question in this case is, whether the defendant rendered himself liable for these goods by reason of his having given authority to the secretary of the Company to pledge his credit for them. I think by his letter of the 17th of July he did give such authority, and consequently that he was liable for orders given subsequently to that date, but not in respect of those given previously. When I say that a party is liable in such cases as this, I mean that, under the circumstances, the Judge ought to direct the jury to find, and the jury ought as reasonable men to find, that he, as a member of the provisional committee, had constituted the secretary his agent to pledge his credit for all things necessary for the working of the provisional committee, and to enable it to go on. It is a question of fact and not a question of law. The jury in such cases are called on to infer from a man's conduct that he gave authority to another to pledge his credit for particular things. When a subscription has been entered into, it would be quite the reverse; for if A. gives money to B. to do a certain act, the natural inference is, that B. is to spend the money and not pledge A.'s credit. But if A. gives B. authority to do something, but gives him no money for the purpose, then he may pledge the credit of his principal for what is necessary. In some things, I admit, the defendant would not be held liable, as for instance, if the secretary were to purchase a horse or carriage or such like. But in this case the defendant, as a member of the provisional committee, must have known that pens, ink, and paper would be required for the use of the committee, as also a room to sit in, &c. It was, therefore, for the jury to say whether or not he gave authority to some one to pledge his credit for these things, and such others as were necessary to carry on the concern;

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and the jury, as reasonable men, could not have found otherwise than in the affirmative. The case has been put of the defendant being one of a minority of the committee who dissented from giving these orders; but if that were so it lay on the defendant to shew it. I am by no means prepared to say that the defendant would not be exempt in such a case, for he gave no actual authority to pledge his credit, and there could be no implied authority, as he dissented from the act. With respect to the opinion said to be expressed by me at Chelmsford, I am surprised that any one should so misunderstand my decision in that case.

ROLFE and PLATT, Bs., concurred.

Rule refused.

COURT OF QUEEN'S BENCH.

In Trinity Term, 1846.

June 6th.

THE QUEEN v. The Inhabitants of AYLESBURY.

A Canal Act, 34
Geo. 3, c. xxiv,
s. 19, provided,
that the Com-

ON appeal, by the churchwardens and overseers of the parish of Aylesbury-with-Walton, against so much of a company should be rated *to all parliamentary and parochial taxes and assessments* for their lands &c., in the same proportion as other lands, &c., lying near the same, are or shall be rated, and as the same lands &c., would be rateable in case the same were the property of individuals in their natural capacity.

By the 54 Geo. 3, c. ciii, for making a fair and equal rate for the county in which the canal was situate, it was provided, s. 4, that the assessment should be made rateably according to the annual rent or value of all estates within every parish.

By the 55 Geo. 3, c. 51, for the more easy assessing, collecting, and levying county rates, it is enacted, s. 1, that the sessions may order a fair and equal county rate to be made, and for that purpose to assess every parish, according to a certain rate of the full and fair annual value of the messuages, lands, tenements, and hereditaments rateable to the relief of the poor therein, *any law or statute to the contrary notwithstanding.*

Held, that the county rate was a parochial tax within the meaning of the first act, and that that act was not repealed by either of the later acts, and therefore that the property of the Canal Company was not liable to be rated at the increased value caused by their occupation of it.

general county rate, made at Aylesbury in and for the county of Buckingham, on Tuesday, the 8th day of April, 1845, as related to the said parish of Aylesbury-with-Walton, the sessions confirmed the said rate, subject to the opinion of the Court of Queen's Bench on the following case:—

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By a statute passed in the 33 Geo. 3, certain persons therein named were incorporated by the style of "The Company of Proprietors of the Grand Junction Canal," and thereby empowered to make a certain navigation, commonly known by the name of the Grand Junction Canal; and, by a certain other statute passed in the following year, 34 Geo. 3, c. xxiv, the said Company were empowered to make certain navigable cuts to Aylesbury, and other places in the county of Buckingham, to communicate with the said Grand Junction Canal. By the 19th section of the last-mentioned act, it is enacted, "that the said Company of Proprietors shall, from time to time, be rated to all parliamentary and parochial taxes and assessments for and in respect of the lands and grounds already purchased or taken, or to be purchased or taken; and all warehouses or other buildings to be erected by the said Company of Proprietors, in pursuance of the said recited act and this act, in the same proportions as other lands, grounds, and buildings lying near the same are or shall be rated, and as the same lands, grounds, and buildings so purchased or taken, or to be purchased or taken and erected, would be rateable, in case the same were the property of individuals in their natural capacity.

Under the powers of the last-mentioned act, the Grand Junction Canal Company purchased certain land in the parish of Aylesbury-with-Walton, which now forms a part of the said Aylesbury Cut, with wharfs and buildings adjoining thereto, and for which the said Company are rated to the relief of the poor.

At the quarter sessions held at Aylesbury for the county of Buckingham, on Tuesday, the 8th of April last, by

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virtue of the powers granted to them by the several acts of Parliament, of the 12 Geo. 2, c. 29, intituled, "An Act for the more easy assessing, collecting, and levying of county rates;" of the 54 Geo. 3, c. ciii, (local), intituled, "An Act for the making a fair and equal county rate for the county of Buckingham;" of the 55 Geo. 3, c. 51, intituled, "An Act to amend an act of his late Majesty King George the Second, for the more easy assessing, collecting, and levying of county rates;" of the 56 Geo. 3, c. 49, intituled, "An Act to explain and amend an act passed in the last session of Parliament for the more easy assessing, collecting, and levying of county rates;" and of the 7 & 8 Vict. c. 33, intituled, "An Act for facilitating the collection of county rates," &c., or some or one of such acts, the justices made a general county rate, wherein the said parish of Aylesbury-with-Walton was assessed at the sum of £18,247, such sum being, for the purpose of this appeal, admitted to be the fair proportion of the county rate assessable upon the parish of Aylesbury-with-Walton, according to the full and fair annual value of the messuages, lands, tenements, and hereditaments in the said parish.

The said cut, wharfs, and buildings occupied by the Grand Junction Canal Company, are assessed in the said county rate at the sum of £1050, being £800 more than the said cut, wharfs, and buildings are now assessed to the poor-rate, and £100 more than the said cut, wharfs, and buildings would have been assessed at, had the same respectively remained or been the property of individuals in their natural capacity, possessing no artificial value.

If the Court of Queen's Bench should be of opinion, that the said property of the Grand Junction Canal Company is not protected by the 34 Geo. 3, c. xxiv, above referred to, and is liable to be rated to this county rate at its improved value, the said sum of £18,247, in the parish of Aylesbury-with-Walton, is to stand confirmed, otherwise to be reduced to the sum of £17,447; and that either party should be

erty to refer in argument to any acts of Parliament
 ay think necessary (a).

he 12 Geo. 2, c. 29, in-
 "An act for the more
 essing, collecting, and
 of county rates," by sect.
 vers the justices at quar-
 ns to make one general
 nt, instead of separate
 der several acts therein
 d.

enacts, "that the church-
 and overseers of the poor
 parish and place within
 ctive counties, shall, out
 money collected or to be
 for the relief of the poor
 parish or place, pay to
 constables the sums of
 by that act rated and
 upon such parish or
 c.

Geo. 3, c. ciii, intituled,
 for making a fair and
 nty rate for the county
 ngham," enacts, sect. 1,
 the justices in quarter
 shall have full power
 ority, and they are here-
 red to assess and tax to
 nty rate every parish,
 , hamlet, liberty, pre-
 d place within the said
 rateably and in due pro-
 according to the annual
 alue of all estates within
 ish, township, hamlet,
 precinct, and place, re-
 y, in manner hereinafter
 d."

empowers the justices
 aid county "to assess
 rish in the said county,
 and in due proportions,
 IV.

not exceeding one penny in the
 pound, according to the several
 amounts of the annual rent or
 value of all estates within every
 parish," as the same should ap-
 pear upon the returns thereinbe-
 fore directed and required to be
 made.

Sect. 8 provides for the mode
 of levying the county rate in
 those parishes where there may
 be no poor rate, upon any inha-
 bitant of the parish, to be repaid
 to such inhabitant by a rate to
 be made by him on all occupiers
 within such parish.

Sect. 9, reciting that it might
 be oppressive in many parishes
 that the county rate should be
 paid out of the rate raised for
 the relief of the poor, enacts
 "That it shall be lawful for the
 justices in quarter sessions, if
 they shall think it convenient,
 to order the sum of money
 directed to be assessed as the
 county rate on any parish, to
 be paid by, and levied on the
 churchwardens and overseers of
 the poor, or petty constables of
 or for any such parish, and to be
 reimbursed in such manner as
 the same is therein directed to be
 paid in cases where there is no
 rate made for the relief of the
 poor."

The 55 Geo. 3, c. 51, was pass-
 ed to amend the 12 Geo. 2, c. 29.

Sect. 1, after reciting that the
 laws then in force were found in-
 effectual for the correction of dis-
 proportions in the county rates,

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M. Chambers and Sanders, in support of the order of sessions.—This case depends upon two questions—1. Whether the county rate is a parliamentary or parochial tax under the Canal Act, 34 Geo. 3, c. xxiv, s. 19. 2. Whether that act is not repealed by the 54 Geo. 3, c. ciii (the local act for making a county rate for the county of Buckingham), or the public act 55 Geo. 3, c. 51. 1. The county rate is neither a parliamentary nor parochial tax. It is clear the word “parliamentary” is not intended to mean “parochial,” as both words are used in the act. It must, therefore, mean a tax created directly by act of Parliament, as a general tax imposing a burthen on the subject, and devoted to Government purposes: *Brewster v. Kitchet* (a). In *Palmer v. Earith* (b), all the cases on the subject are well considered; and the case of *Waller v. Andrews* (c), which will probably be cited on the other side, is distinguished on the ground that the assessment there in question came within the words “all outgoings whatsoever,” not that it was a

enacts “that it shall be lawful for the justices in quarter sessions, and they are hereby authorised and empowered to order and direct a fair and equal county rate to be made according to the directions therein contained, and for that purpose to assess every parish, according to a certain pound rate, (to be from time to time fixed and publicly declared by such justices), of the full and fair annual value of the messuages, lands, tenements, and hereditaments rateable to the relief of the poor therein, any law or statute to the contrary thereof notwithstanding.

By sect. 12, the justices are authorised to issue their warrants for levying the new rates, in the same manner as then authorised

and practised by law for collecting the county rates.

Sect. 13, reciting “That it would be inconvenient and oppressive to many townships and places, that the sum of money which may be assessed on them as or for a county rate under this act, should be paid out of any rate for the relief of the poor, where such poor rate doth not apply separately and distinctly to the parish, township, or place,” empowers the justices in such cases to order the county rate to be levied as therein directed in places where there is no poor rate.

(a) 2 Salk. 198.

(b) 14 M. & W. 428.

(c) 3 M. & W. 312.

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parliamentary tax. See also *Baker v. Greenhill* (a). Then a parochial tax means one for parish purposes, collected by parish officers, and exclusively used for the parish, as a poor rate is always considered a parochial tax. 2. But if this is such a tax, so that an exemption from it comes within the provisions of the 34 Geo. 3, c. xxiv, s. 19, that provision is repealed by one or both of the subsequent acts. The 2nd section of the 55 Geo. 3, c. 51, shews that the full annual productive value of the land is contemplated for the county rate; that means the value to the party occupying. And if there be any doubt in the language of their act, it will be interpreted against the Canal Company, and they will only be exempted from contribution to the public stock by express words: *Barrett v. The Stockton and Darlington Railway Company* (b), *Rex v. Toms* (c), *Chatfield v. Ruston* (d), and *Rex v. The Inhabitants of Wistow* (e).

Sir F. Kelly, Solicitor-General, contra.—The answer of the Company to this claim is, that this is in substance and in fact a poor rate, as it is payable out of it; and that, for all purposes of exemption and liability, they are both parochial taxes: *Rex v. The Grand Junction Canal Company* (f) decided this question as to a poor rate. [Patteson, J.—It is clear, that, as to the poor rate, the Company would only be rateable at the lower value. Is there anything to prevent overseers from making a distinct rate for the county?] The 12 Geo. 2, c. 29, s. 2, enacts, that the county rate shall be paid out of the poor rate, and neither the local act, nor the 55 Geo. 3, c. 51, affect that enactment, except that sect. 13 of the latter provides for the inconvenience and oppression to townships and places to which the

(a) 3 Q. B. R. 148.

(d) 3 B. & C. 863.

(b) Ante, Vol. 2, p. 443; 2 M. & G. 134.

(e) 5 A. & E. 250.

(c) 1 Dougl. 401.

(f) 1 B. & A. 289.

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poor rate does not distinctly and separately apply. The law remained unchanged till the 7 & 8 Vict. c. 3, which recited that the machinery of the poor-law was convenient for the collection of rates, and therefore that the collection should in future be made by the constables instead of the high constable. Under the law there was no power to make a county rate. The 7 & 8 Vict. c. 3, though passed since this case arose, shews the intention of the Legislature to maintain a uniform principle of rating.

LORD DENMAN, C. J.—I think the appellants in this case were right upon both grounds. The poor rate is the source from which the county rate is to come, by the 12 Geo. 2, c. 29; and there is nothing in any other act to authorise the Legislature to interfere with the established rule. Then the Railway Company, being exempted from being liable to pay the increased value by their act, were entitled to that exemption notwithstanding the subsequent act. The general Statute Geo. 3, c. 51, only applies to the way in which the rate is levied on parishes, not to the mode of assessing individuals.

PATTESON, J.—I am of the same opinion. No subsequent act interferes with the principle of the 12 Geo. 2, c. 29, s. 2. The county rate is to be paid out of the poor rate, and there is no power given to make a distinction. The 12th section of the 55 Geo. 3, c. 51, shews it is levied and raised as a poor-rate. The case of oppression in the 13th section of that act, as also the oppression by a local act, do not assist the respondents here.

WILLIAMS, J.—The 12th section of the 55 Geo. 3, c. 51, relied on by Mr. *Chambers*, expressly alludes to the same mode of raising the money out of the poor rate, as was provided by the 12 Geo. 2, c. 29. There is no new mode contemplated for raising the

rate. There is, therefore, nothing to take the case out of the 12 Geo. 2, c. 29, s. 2, and the protection given by the Company's act. I think, therefore, that the £800 ought to have been deducted from this rate.

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Rate amended accordingly.

COURT OF EXCHEQUER.

In Trinity Term, 1846.

WALSTAB v. SPOTTISWOODE.

June 12th.

ASSUMPSIT. The declaration stated, that, on &c., the defendant and certain other persons, whose names are to the plaintiff unknown, agreed together to form a certain Joint-stock Company, called "The Direct Birmingham, Oxford, Reading, and Brighton Railway Company," for the purpose of making a certain railway, under the powers of an act of Parliament to be applied for in that behalf; the capital of 7 & 8 Vict. c. 110, it appeared that a prospectus had been issued stating that the capital was to be £2,000,000, in 80,000 shares of £25 each, and that the deposit required was 2*l.* 12*s.* 6*d.* per share. The plaintiff applied to the provisional committee for shares, and received a letter of allotment for thirty shares, signed by the secretary, which required payment of the deposit thereon, to one of certain bankers therein named, on or before a certain day, otherwise the allotment would be null and void; and stated, that the letter, with the banker's receipt appended thereto, would be exchanged for scrip, on the plaintiff presenting it at the office of the Company, and executing the parliamentary contract and subscribers' agreement. The plaintiff duly paid the deposit, but after several applications for scrip was informed by the secretary, that the directors did not mean to issue scrip; and on the plaintiff requiring the repayment of her deposit money, she was told by one of the provisional committee, not the defendant, that a statement would be made of the concerns of the Company, and the surplus divided.

In an action by an allottee to recover deposits from a member of the provisional committee of a railway company, provisionally registered under the

Held, first, that the application for shares and payment of the deposit amounted to nothing if the scheme proved abortive; and that the allottee might recover the amount deposited from the defendant in an action for money had and received.

Secondly, That there was evidence to go to the jury, and from which they might infer that the concern was abandoned.

Quere, whether, under such circumstances, the plaintiff could recover on a special count in assumpsit for not delivering scrip.

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which Company was to consist of £2,000,000, in 80,000 shares of £25 each, to be allotted by the committee of management of the said Company to such persons as should apply to them, and as they should select for that purpose. And the plaintiff then, to wit, on &c., at the request of the defendant, applied to the committee of management for, and there were then allotted to her by the said committee, by a certain letter of allotment to her directed and delivered, divers, to wit, thirty of the said shares; and thereupon, then, in consideration of the premises, and that the plaintiff, at the instance and request of the defendant, would, on or before the 24th day of October, A. D. 1845, pay to one of certain Banking Companies in the said letter of allotment named, whereof one was a certain Banking Company, called "The London Joint-stock Bank," to the account of the said Joint-stock Railway Company, a deposit of 2*l.* 12*s.* 6*d.* upon each of the said thirty shares, making in the whole the sum of 78*l.* 15*s.*; and would present the letter of allotment, with a receipt of one of the said banks for the said deposit appended thereto, to the defendant, or his agents in that behalf, at the office of the said Company, and execute a certain contract relating to the formation of the said Company, called "The Parliamentary Contract;" and a certain agreement, also relating to the formation of the said Company, called "The Subscribers' Agreement," within a certain reasonable time appointed in that behalf, to wit, on the 27th day of October, A. D. 1845, or within a reasonable time then next following, the said contract and agreement to be prepared by the defendant, and ready for execution at such time as aforesaid, the defendant then promised the plaintiff to give her, in exchange for the said letter of allotment and bankers' receipt, scrip certificates for the said thirty shares, (that is to say), certain certificates in writing, purporting, that the holder or holders thereof were entitled to thirty shares in the capital of the said Joint-stock Railway Company, and to be shareholders thereof in respect of such shares. And the plaintiff avers that she

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confiding in the said promise of the defendant, afterwards, and within the time limited in that behalf, namely, on the said 24th day of October, A. D. 1845, paid to the said London Joint-stock Bank on account of the said Railway Company, the said deposits on each of the said shares, amounting in the whole to the said sum of 78*l.* 15*s.*, and then received from the said bank a receipt for the same, appended to the said letter of allotment, and afterwards, and within the time appointed in that behalf as aforesaid, and at a proper and reasonable time in that behalf, to wit, on &c., the plaintiff presented the said letter of allotment, with the said bankers' receipt appended thereto, at the office of the said Railway Company, to wit, at Moorgate-street, in the city of London, to the defendant, and then was and always since has been ready and willing, and then offered to the defendant to deliver to him the said letter of allotment and bankers' receipt appended thereto, and to execute the said parliamentary contract and subscribers' agreement, and to receive such scrip certificates as aforesaid in exchange for the said letter of allotment and bankers' receipt, and then requested the defendant to exchange the said letter of allotment, with the said bankers' receipt appended thereto, for such scrip certificates as aforesaid; and although a reasonable time for the defendant so to do had elapsed long before the suit commenced, yet the defendant, not regarding his said promise, did not, nor would, at the time when he was so requested by the plaintiff so to do, or at any time before or since, exchange the said letter of allotment, with the said bankers' receipt appended thereto, for such scrip certificates as aforesaid, or deliver such scrip certificates as aforesaid to the plaintiff, but then wholly neglected and refused, and still neglects and refuses so to do, and then wholly discharged the plaintiff from executing the said contract or agreement; whereby, and by reason of the premises, the plaintiff has been greatly damaged, and suffered great loss and expense, and has also lost the sum of £20, which she otherwise would have made and gained as a pro-

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fit upon a bargain for the sale of the said thirty scrip certificates, which she had before that time, to wit, on the 25th October, 1845, made with one J. Harrison.

There were other counts for money had and received, money paid, money lent, and on an account stated.

Plea, 1. Non assumpsit. There were several other pleas, which are not material.

At the trial, before *Pollock*, C. B., at the London Sittings after last Hilary Term, the following facts appeared:—The defendant was a member of the provisional committee of the Direct Birmingham, Oxford, Reading, and Brighton Railway Company, which had been provisionally registered. On the 7th of October, in last year, the plaintiff, Mrs. Walstab, made the following written application to the provisional committee:—

“ I request that you will allot me seventy shares, of £25 each, in the Direct Birmingham, Oxford, Reading, and Brighton Railway; and I do hereby undertake to accept the same, or any less number that you may allot to me, and to pay the deposit of 2*l.* 12*s.* 6*d.* per share thereupon, and sign the parliamentary contract and subscribers’ agreement when required. (Signed) “ ELIZABETH WALSTAB.”

To this letter the following answer was returned, on the 18th of October:—

“ W. 283.

“ Letter of allotment—(Not transferable).

“ Direct Birmingham, Oxford, Reading, and Brighton Railway.

“ Capital £2,000,000, in 80,000 shares of £25 each.

“ Deposit, 2*l.* 12*s.* 6*d.*

“ No. of Letter, 123

“ No. of Shares, 30.

“ 46, Moorgate-street, London,
October 18, 1845.

“ Madam—The committee of management have allotted to you thirty shares in this undertaking; and I am directed

to request you will pay the deposit of 2*l.* 12*s.* 6*d.* per share, amounting to 78*l.* 15*s.*, into one of the under-mentioned banks, on or before Friday the 24th day of October, 1845, or this allotment will be null and void.

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"This letter, with the bankers' receipt appended hereto, will be exchanged for scrip upon your presenting it at the offices of the Company, and executing the parliamentary contract and subscribers' agreement, which will lie at the above offices on and after the 27th of October; and due notice will be given when the deeds will be sent into the country.

"I am, Madam, your obedient servant,
"J. B. RAYNER, Secretary.

"To Mrs. Elizabeth Walstab."

The letter then contained a list of bankers to whom the deposits were made payable.

On the 24th of October, the plaintiff paid to the Company the sum of 78*l.* 15*s.*, as a deposit on thirty shares, and received the bankers' receipt for the same; the plaintiff's son presented the bankers' receipt to the Company, and made several fruitless applications to the committee for scrip, and was finally informed, in the month of November, that the directors had come to the resolution not to issue any scrip. He was also informed, that the greater part of the deposits had been expended, and that the balance would be rateably divided. It appeared that the directors, finding it impossible to go to Parliament during the present session, had determined, on the 27th of November, not to issue scrip. Of the entire number of 80,000 shares, 7000 were allotted, but deposits were paid upon 4000 only, producing altogether the sum of £10,500.

On the part of the defendant, several objections were made to the plaintiff's right to recover:—First, as regarded the special count, that the letters of the 7th and the 18th of

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October did not prove the contract therein alleged, as they did not shew a contract to give scrip, but only to allot shares; secondly, that the contract, if any, was not signed by the defendant, but by the secretary of the Company, who had no authority to bind him; thirdly, that, if there was any contract to give scrip, it was illegal, being contrary to the 7 & 8 Vict. c. 110, and therefore could not be enforced. As to the second count, it was contended, that there was no failure of consideration on the ground of the abandonment of the undertaking, as, by the statute, the provisional committee had no power to abandon it, and there was, in fact, no evidence of abandonment.

For the plaintiff, it was insisted, on the authority of *Nockells v. Crosby (a)*, that the committee were bound to return the plaintiff's deposit, inasmuch as the expenses of an abortive scheme were to be borne by the projectors. The Lord Chief Baron overruled the objections, and directed a verdict for the plaintiff for 78*l.* 15*s.*, reserving leave for the defendant to move to enter a nonsuit, if the Court should be of opinion that the plaintiff was not entitled to recover.

In Easter Term, (April 22nd), *Martin* obtained a rule nisi accordingly. He objected, that the promise stated in the declaration was not proved. 1. Because the documents produced shew an agreement for shares, not for scrip certificates as declared on. 2. Because there was no evidence of any authority in the secretary who signed the letters to bind the defendant, the only implied authority being to do such things as are permitted by the 7 & 8 Vict. c. 110, of which issuing scrip is not one. He also contended, that the count for money had and received could not be maintained, unless upon a total failure of consideration. In Trinity Term,—

(a) 3 B. & C. 814.

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Jervis and *Willes* shewed cause (a).—The argument for the defendant must go to this extent, if it is to be supported at all, that the directors of a scheme of this kind are empowered to deal with the subscriptions, and are only bound to return the balance after deducting the expenses, and that the subscribers are bound to pay the expenses out of the deposits; and even if they exceed them, that the allottees are liable to all costs whatever. 1. The Company were bound to exchange the plaintiff's letter of allotment for scrip, as soon as the allotment of shares was made to her, and the deposits paid on them. That is the effect of their contract as shewn by the letters. [*Alderson*, B.—Their argument will be, that the letter of the 18th of October contains no agreement, but a mere intimation of their intention.] The letters are not to be taken together; the letter of allotment does not refer to the former; the contract is in the second, and no part of it can be considered an intimation of intention. It is no answer for the defendant to say, that the law will not allow him to issue scrip. That is not so. The 24th section of the 7 & 8 Vict. c. 110 (b), empowers them to do so under a penalty, if they do it before provisional registration; and the 25th section does not preclude them, for that is shewn by sect. 51 not to relate to certificates of shares as these are, but to shares in a Company constituted by deed. The contract of this Company was express to issue scrip, which is not made illegal by the act; and, therefore, the first count of the declaration is supported.

But the principal question turns on the second count for money had and received; and the plaintiff contends, on the authority of *Nockells v. Crosby* (c), that, when a scheme of a joint-stock Company turns out to be abortive, the subscribers are entitled to receive back their deposits, which

(a) May 29, before *Pollock*, C. set out in *Young v. Smith*, ante, p. 135.
Alderson, *Rolfe*, and *Platt*, Bs.

(b) See this and other sections (c) 3 B. & C. 814.

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they have paid by way of *earnest*, as it is called by sect. 24, in full, and the expenses fall on the promoters. In that case, where a scheme for establishing a tontine was put forth, stating that the money subscribed was to be laid out at interest, and, after some subscriptions had been paid to the directors, in whom the management of the concern was vested, but before any part of the money was laid out at interest, the directors resolved to abandon the project, it was held that each subscriber might, in an action for money had and received, recover the whole of the money advanced by him, without the deduction of any part towards the payment of the expenses incurred. In *Pitchford v. Davis* (a), it was held, that, where the directors of a Company had entered into contracts, when a small portion only of the capital stated in the prospectus had been paid up, a subscriber, who had paid deposits, was not liable for such contracts, unless he could be shewn to have assented to, or expressly authorised them: *Fox v. Clifton* (b), *Bourne v. Freeth* (c), and *Lake v. The Duke of Argyll* (d). It is clear, then, that, at common law, the directors have no right to appropriate the expenses. If they do, before the whole money is subscribed, it must be at their own risk. Nor does provisional registration, under the 7 & 8 Vict. c. 110, s. 23, empower them to do so. It does not enlarge their previous powers, but prevents them from doing the acts enumerated until after provisional registration. [*Alderson*, B.—This deposit of 2*l.* 12*s.* 6*d.* is made up of 2*l.* 10*s.* (or £10 per £100), required by the standing orders of Parliament to be deposited with the Accountant-General, and the 2*s.* 6*d.* (or 10*s.* per £100) allowed by the 23rd section to be received by the directors; so that, even supposing they could deal with the 2*s.* 6*d.*, they have no right to appropriate the 2*l.* 10*s.* to the expenses, as it was paid under the understanding that it

(a) 5 M. & W. 2.

(b) 6 Bing. 776.

(c) 9 B. & C. 632.

(d) 6 Q. B. R. 477.

was to be applied to the obtaining an act of Parliament.] In any case, therefore, the plaintiff is entitled to recover that portion of her demand.

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Martin, V. Lee, and Peacock, contra.—The contract in the first count of the declaration is not made out. It was contained in the two letters and amounts to an obligation on the part of the plaintiff to pay her deposit, and sign the parliamentary contract, as soon as the allotment of shares was made. There is, therefore, no failure of consideration, as the thirty shares were allotted to her. Now, the directors have no power to issue scrip; for, if not absolutely illegal, it is against the policy of the 7 & 8 Vict. c. 110: at all events, there is a wide distinction between *scrip* and *shares*: *Jackson v. Cocker* (a), *Leeman v. Lloyd* (b), and *Mitchell v. Newhall* (c).

As to the count for money had and received, no distinction can be made as to the parts of which the 2*l.* 12*s.* 6*d.* is supposed to be made up. The question raised was entirely on the failure of consideration. The true construction of the 7 & 8 Vict. c. 110, seems to be, that the parties subscribing to schemes of this sort enter into a quasi partnership with the promoters. They know that their money is to be applied to the common purpose of carrying out the undertaking, and that the promoters will take the necessary steps for so doing, though they do not pretend to ensure success; so that, of necessity, he authorises the appropriation of his subscription to the necessary preliminary expenses. Their intention is a question of fact, and though it may be, that if, after a reasonable time of trial, the scheme were unsuccessful, they would be entitled to recover back their money, that would be subject to the deduction of their share of the legitimate expenses. It is true, that, in *Kemp-*

(a) Ante, Vol. 2, p. 368; 4
 e*as*v. 59.

(b) 14 L. J., N. S., Q. B., 165.

(c) Ante, p. 300.

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son v. Saunders (a), money paid for shares in an undertaking which was abandoned was recovered back; but the authority of that case is very questionable; and in *Holmes v. Higgins (b)*, a number of persons associating together, and subscribing money for the purpose of obtaining a bill in Parliament to make a railway, were held to be partners in the undertaking; and the authority of that case is supported by *Lucas v. Beach (c)*. The cases cited on the other side are not impeached, but are all distinguishable in their facts from the present. Even if there were no partnership, or quasi partnership in this case, the plaintiff is not entitled to recover, as she obtained what she applied for, namely, an allotment of shares in the Company, whether adequate in consideration or not: *Hitchcock v. Coker (d)*.

Lastly, there is no evidence here of the dissolution of this Company. The 7 & 8 Vict. c. 110, s. 23, defines how long provisional committees are intrusted with their powers, and before that time they had no power to dissolve. They were not bound by their prospectus to go to Parliament in the next session; after that, they might be compelled by the subscribers to proceed. [*Alderson, B.*—Is there any authority that the promoters of such a scheme may not abandon it?] *The Kidwelly Canal Company v. Raby (e)* is an authority that they cannot. [*Alderson, B.*—That was the case of a Company actually formed; this is only a project.] They could not dissolve without the consent of all, or, at least, the majority of the subscribers; and the declarations made by the chairman as to the abandonment of the undertaking were not binding on the Company. They cited, as to this point, *Const v. Harris (f)*.

Cur. adv. vult.

POLLOCK, C. B., now delivered the judgment of the Court.—This was an action of assumpsit. The declaration

(a) 4 Bing. 5.

(b) 1 B. & C. 74.

(c) 1 M. & G. 417.

(d) 6 A. & E. 438.

(e) 2 Price, 93.

(f) 1 Turn. & R. 496.

contained a special count, founded on an alleged contract, to deliver scrip. There was also a count for money had and received. At the trial before me, on the 27th of February, it appeared that the defendant was a member of the provisional committee of the Direct Birmingham, Oxford, Reading and Brighton Railway Company, registered provisionally under the 7 & 8 Vict. c. 110. The prospectus announced the capital to be £2,000,000, in 80,000 shares, of £25 each share. The deposit required was stated to be 2*l.* 12*s.* 6*d.* per share. On the 7th of October, 1845, the plaintiff applied to the provisional committee for shares, according to the form directed by the committee (which form it is not necessary now to state); and, on the 18th of October, the plaintiff received a letter of allotment, in the following form:—

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“ Letter of allotment — (Not transferable).

“ Direct Birmingham, Oxford, Reading, and Brighton
Railway Company.

“ Capital £2,000,000, in 80,000 shares of £25 each.

“ Deposit, 2*l.* 12*s.* 6*d.*

“ No. of Letter, 128.

“ No. of Shares, 30.

“ 46, Moorgate-street, London,
18th October, 1845.

“ The committee of management have allotted to you thirty shares in this undertaking; and I am directed to request you will pay the deposit of 2*l.* 12*s.* 6*d.* per share, amounting to 78*l.* 15*s.*, into one of the undermentioned banks, on or before Friday, the 24th of October, 1845, or this allotment will be null and void.

“ This letter, with the bankers' receipt appended hereto, will be exchanged for scrip on your presenting it at the offices of the Company, and executing the parliamentary contract and subscribers' agreement, which will lie at the above offices on and after the 27th of October; and due notice will be given when the deeds will be sent into the country.”

This letter was signed by the secretary, and set out the

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names of several bankers; and the plaintiff, in due time, paid the deposit on the thirty shares into the London Joint-stock Bank, the bank of the Company, and, on the 27th of October, applied for scrip.

The time for delivering scrip was extended by the provisional committee to the 6th of November. On the 12th of November the plaintiff applied again, and after several fruitless applications at the office of the Company, she was told by the secretary, that the directors did not mean to issue scrip; and upon the plaintiff's requiring the money to be repaid, the final answer given at the office by one of the provisional committee, not the defendant, was, that a statement would be made of the concerns of the Company and the surplus would be divided. It was admitted at the trial, that 40,000 shares had been applied for; 7000 had been allotted; but about the 25th of October, 1845, public confidence in railway schemes having been much shaken the deposit was paid on 4000 shares only, a number much too small to justify the proceeding with the scheme. The plaintiff failing to get scrip or her money again, brought the present action.

At the trial it was contended by the defendant's counsel that the defendant was not liable under either of the counts in the declaration; that the special count could not be supported, and that the defendant was not liable on the count for money had and received. A verdict was found for the plaintiff, under my direction, with liberty for the defendant to move to enter a nonsuit, if there was no evidence to support the verdict; all the points raised by the defendant's counsel being reserved. Accordingly, Mr. *Martin* in East Term obtained a rule, which was argued on the 29th and 30th of May last, before me and my Brothers *Alderson*, *Rolfe*, and *Platt*.

For the defendants it was contended, that the contract as laid in the special count, was not proved, and that the defendant was under no contract to deliver scrip. But the argument chiefly turned on the count for money had and

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received; and it was alleged that the subscribers became a quasi partnership, and that their subscriptions went into a common fund, to be applied for the general benefit; and in consequence that the plaintiff could not sue the defendant at law. A further point made was, that the application being made for an allotment of shares, which, in fact, had been allotted, the plaintiff had really obtained all she asked for, and had no grounds of complaint; and lastly, it was said, that there was no evidence of the concern being at an end, as the defendant was not bound by what another member of the committee stated; and, unless the concern was abandoned, an action for money had and received would not lie.

For the plaintiff, it was urged, that the special count was proved, and there was evidence that the concern was at an end; and the case of *Nockells v. Crosby (a)*, was cited as an authority. We do not think it necessary to give any opinion on the special count, as to which some doubt may be well entertained, because we are all of opinion that the plaintiff is entitled to recover on the count for money had and received; and as the plaintiff cannot be entitled, in a case like the present, to damages on the first count, for not delivering scrip, as upon a contract broken, and also to have her money returned, as on a contract rescinded, we are of opinion that the verdict for the plaintiff on the count for money had and received ought to stand, but that the verdict for the plaintiff on the first count should be set aside, and a verdict entered for the defendant.

With respect to the first point made for the defendant, that the subscribers became quasi partners, and that their subscriptions became a common fund, to be applied for the general benefit, so that no one could claim back his subscription, we are of opinion that such is not the true result of the publication of the prospectus by the provisional com-

(a) 3 B. & C. 814.

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mittee (of which the defendant was one), of the a for shares, and the allotment and the payment o posits. We think, in this case, no partnership eve commenced. In the case of *Pitchford v. Davis* (decided, that where a prospectus was issued for tion to be carried on by means of a certain capi scriber did not become a partner, unless the ter prospectus were in that respect fulfilled. And sion has been since frequently acted on in this Courts. In the case of *Nockells v. Crosby* (b), cit plaintiff's counsel, a similar doctrine was held. to us that the application for shares and payme deposit amounts to nothing, if the shares subscrib so few that the concern cannot proceed, and th must necessarily be abortive.

With respect to the point, that the plaintiff a shares, and that shares were actually allotted, a fore, no action can be maintained, it is a suffice to say, that the allotment of shares in an abortiv which does not correspond with what the prosp out, is really not a compliance with the applicatio scheme has wholly failed, and has ceased even as tion, nothing whatever has been allotted to the s But it was urged, that there was no evidence of cern being at an end. We think that the answe the office by one of the provisional committee, th ment would be made, and the surplus would b was evidence to go to the jury that the concern doned; and unopposed, as this was, by any evide part of the defendant, we think that the jury warranted in finding that the scheme was at a so, we think, on the authority of *Nockells v. Crosd* the plaintiff is entitled under the count for mone received to recover back her deposit.

(a) 5 M. & W. 2.

(b) 3 B. &

A question was raised, though not much argued, whether there was any difference between one portion of the deposit and another. It being, as we think, manifest that the deposit of 2*l.* 12*s.* 6*d.* consisted of 2*s.* 6*d.*, being 10*s.* per cent. on the £25, in pursuance of the 23rd clause of the act referred to, and the residue being £10 per cent., required to be deposited by the Standing Orders of Parliament; we think it is clear, beyond all doubt, that the amount paid, in order to be deposited in pursuance of any Standing Orders, must be returned to the plaintiff. There is no foundation whatever for a claim to retain that which was paid for a specific purpose. But we think that the *remainder* of the money may be also claimed back, and that the language of *Littledale, J.*, and *Holroyd, J.*, in *Nockells v. Crosby (a)*, applies to this part of the case. To use the language of *Holroyd, J.*, in that case: "The concern was never really set agoing, and the expenses incurred in setting a scheme on foot are not to be paid out of the concern, unless they are adopted when it is actually in operation. All the steps taken were only preparatory to carrying the project into effect; and, as it never was carried into effect, the plaintiff was entitled to have back the whole of the money advanced."

On these grounds, we think that the verdict ought to be entered for the defendant on the first count on the plea of non-assumpsit; but that the verdict for the plaintiff on the other issues raised on that count, and on the count for money had and received, ought to stand. Our judgment, therefore, must be for the plaintiff.

Rule absolute accordingly.

(a) 3 B. & C. 814.

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COURT OF QUEEN'S BENCH.

In Trinity Vacation, 1846.

LAWTON v. HICKMAN.

June 27th.

The 7 & 8
Vict. c. 110,
s. 26, enacting,
that, "until a
joint-stock
Company,
formed after
the 1st of No-
vember, 1844,
shall have ob-
tained a certifi-
cate of com-
plete registra-
tion, contracts
for the sale of
shares, or any
interest therein,
shall be void, and the persons entering into such contracts liable to a penalty," does
to Railway Companies, which cannot be carried into execution without the authori-
ment. See *Young v. Smith*, ante, p. 135.

THIS was an action of debt for £15, for goods delivered, and money paid, with a count on an stated.

Plea, That the goods and chattels in the de mentioned were and are divers, to wit, ten share each, of and in the capital stock of a certain jc Company, that is to say, a joint-stock Compan and known as "The Grand Union Railway C illegally sold and delivered by the plaintiff to

In an action for goods sold and delivered, the defendant pleaded, that the goods were scrip certificates of shares in a joint-stock Company called "The Grand Un Company," formed after the 1st November, 1844, illegally sold by the plaintiff to the against the form of the statute, &c., and (after negating the exceptions in the 2nd s act) that the said joint-stock Company was formed after the 1st of November, 184 not, before the sale, obtained a certificate of complete registration:—Replication Company was a Railway Company, for the purpose of making a railway, under th of an act to be obtained for that purpose, with the usual power to take lands, tol that the purposes thereof could not be carried into execution without the authorit ment, and was a Company within the proviso of section 2 of the above act, (setting that within twelve months next before the sale the said Company was provisionally and obtained a certificate thereof pursuant to the act.

Held, that the replication was a good answer to the plea, and that it was not i state the execution of a railway to be the sole purpose of the Company.

And, to a similar plea, that it was a good replication, that the Company was a C executing a work which could not be carried into execution without the authority of without stating the reason; as the Court would take notice, from the whole record, 1 Railway Company.

And, that a plea founded upon the 26th section must negative the exceptions i and shew why the Company is such a one as requires to be registered under the act Such certificates of shares in a Railway Company may be declared on as goods s

endant, by the delivery of the scrip certificates of and
or the said shares, after the 1st November, 1844, to
wit, on &c., for a certain sum of money, to wit, £25, con-
trary to the form of the statute, &c. ; and that the supposed
sale and delivery in the declaration mentioned was and is
the said illegal sale and delivery ; and that the money in the
declaration mentioned was and is parcel of the said price
and value of the said shares so illegally sold and delivered,
and no other money ; and that the account in the declara-
tion mentioned was stated of and concerning the money
supposed to be due from the defendant to the plaintiff for
the price and value of the said shares so illegally sold and
delivered, and no other money ; and the money found to be
due upon the said account was and is the money so sup-
posed to be due, and no other money. And the defendant
further says, that the said joint-stock Company was, before
and at the time of the said sale and delivery, a joint-stock
Company, established in part of the United Kingdom of
Great Britain and Ireland other than Scotland, to wit, in
the county of Derby, for the purpose of profit to the share-
holders, subscribers, and members thereof, and was not a
banking company, or school, or scientific or literary insti-
tution, or friendly society, loan society, or benefit building
society, enrolled under the statute in force respecting such
societies ; and the said joint-stock Company, before and at
the last-mentioned time, was a partnership, the capital where-
of, to wit, £1,800,000, to wit, 72,000 shares, was agreed to
be divided into shares of £25 each, and so as to be transfer-
able without the express consent of all the co-partners ; and
that the said joint-stock Company was not, at the time of
the said sale, incorporated by statute or charter, or autho-
rised by statute or letters-patent to sue and be sued in the
name of any officer or person ; and that the formation of the
said joint-stock Company was commenced after the 1st No-
vember, 1844, to wit, on &c. ; and the said joint-stock Com-
pany had not, at any time before or at the time of the said

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sale and delivery, obtained a certificate of complete registration as required by the statute in such case made; and that the plaintiff, before and at the time of the said sale and delivery, claimed to be entitled to the said shares so sold and delivered, and sold and delivered the same to the defendant as being so entitled.—Verification.

Replication: That the said joint-stock Company in the said last plea mentioned was established as in that plea mentioned, for the purpose of making and maintaining a certain railway, to be called, to wit, "The Grand Union Railway," under the authority of an act of Parliament to be obtained for that purpose, with the usual powers to take land for the purposes of the said railway, and to take tolls from persons using the said railway, and other powers and authorities usually granted by Parliament to railway companies; and that the purposes of the said joint-stock Company, and the said railway intended to be executed by them, could not be carried into execution without first obtaining the authority of Parliament in that behalf; and that, before and at the time of the said sale and delivery of the said scrip certificates in the said last plea mentioned, the said joint-stock Company was a Company for executing a railway within the true intent and meaning of that part of the statute passed in &c., (7 & 8 Vict.), intituled "An Act for the registration, incorporation, and regulation of joint-stock Companies," whereby it was enacted and provided, (that is to say), "Provided nevertheless, that, except as hereinafter specially provided, this act shall not extend to any Company for executing any bridge, road, cut, canal, reservoir, aqueduct, waterwork, navigation, tunnel, archway, railway, pier, port, harbour, ferry, or dock, which cannot be carried into execution without obtaining the authority of Parliament;" and that, within twelve months next before the said sale and delivery of the said scrip certificates in the said last plea mentioned, to wit, on the 18th day of April, 1845, the said joint-stock Company was provision-

ally registered, and obtained a certificate of such provisional registration, pursuant to the said last-mentioned act.—Verification.

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Special demurrer: That the circumstance of the said Company being established for the purpose in the said replication mentioned, does not render the sale and delivery of the said shares, goods, and chattels in the said account stated, legal, nor does such circumstance entitle the plaintiff to recover the sum of money in the declaration mentioned, or any part thereof; and also, for that the replication is uncertain, inasmuch as it does not state the nature of the said railway or the termini thereof, nor can it be seen from the said replication that the said railway was a railway which could not be carried into execution without the authority of Parliament; and it is consistent with the said replication, and all the allegations therein, that the said railway might be carried into execution without the authority of Parliament, since it merely appears that the said Company was established for the purpose of making and maintaining a certain railway, to be called, to wit, "The Grand Union Railway," under the authority of an act of Parliament, with certain powers therein referred to; and it is consistent with the said allegation, that the said railway might and could be made without the authority of Parliament; and, although it is alleged that the purposes of the said joint-stock Company and the said railway could not be carried into execution without first obtaining the authority of Parliament, it does not appear that the said railway could not be carried into execution without such authority. And also, for that the allegation in the said replication, that the said joint-stock Company was a Company for executing a railway within the true intent and meaning of the statute therein referred to, is uncertain and too general, and is an allegation of a conclusion of law, and not of matter of fact, and no certain issue in fact can be taken thereon, nor can any issue be taken thereon without leaving to the jury

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questions on the construction of the said statute. And for that it does not appear, that, at the time of the delivery of the said scrip certificates, the said Company was a Company for executing a railway; and, although the said Company was established for such purpose, it did not have had that object in view at the time of the delivery and delivery. And also for that it does not appear by the said replication that the purpose of making the said scrip was the sole purpose for which the said Company was established, and which it had in view. And also for that the said replication is a departure from the declaration, which admits that what are called in the declaration goods and chattels are shares in a joint-stock Company, which are goods and chattels, but choses in action; and the plaintiff cannot recover the price and value of the said shares upon his declaration for goods and chattels sold and delivered. Joinder in demurrer (a).

Pashley, in support of the demurrer (b).—The point raised by this case has been already decided by the Court of Exchequer in *Young v. Smith* (c); that, therefore, upon the true construction of the 7 & 8 Vict. c. 11, the restriction placed by sect. 26, in the sale of shares in joint-stock Companies formed since the 1st of November 1844, and provisionally, but not completely registered, is to be extended to Companies requiring the authority of Parliament to carry them into execution.

The 26th section does not mention Railway Companies in express terms; and it is therefore contended, that, by sect. 2, they are taken out of its operation. But this is not necessarily the case. The provision in sect. 2, "except as hereinafter is specially provided," not "in

(a) All the material sections of the act are fully set out in *Young v. Smith*, ante, p. 135.

man, C. J., *Patteson*, & *Liams*, Js.

(c) Ante, p. 135.

(b) June 5th, before Lord Den-

mentioned," and the words are not equivalent. The whole statute must be read together, and, if a railway is not within sect. 26, it is not within sect. 25. Nor do sects. 23 and 24, as to provisional registration, mention railways expressly; but the mode in which a Railway Company is to obtain a certificate of complete registration is provided specially by sect. 9. The effect attempted to be put on the proviso is repugnant to the general scope and provision of the act; and a saving clause, if so repugnant, must be rejected as void, and a general clause rather prevail: *Jenk. 4th Cent. Cas. 4, No. 2; 1 Kent, Comm. 462.* Sect. 26 is to prevent gambling, and the latter part of it is useless if railways are excepted from it by the proviso in sect. 2. *Patteson, J.*—That construction would altogether get rid of the proviso in sect. 2.] As to the special objections, the purposes of the Company are not sufficiently stated. The application avers that the purposes of the Company and the railway could not be carried into effect without first obtaining an act of Parliament. But the Court will not take judicial notice that a railway cannot be constructed without the authority of Parliament. It may be such a railway as could be made without an act. And the statement of the *purpose* is a conclusion of law, not fact, and not traversable: *Fletcher v. Crosbie (a).*

Cole, contra.—The 26th section is qualified by the 2nd. The act clearly contemplates that Railway Companies may, after provisional, and before complete registration, obtain an act of Parliament, in which case no complete registration would ever be necessary. Therefore the act excepts such companies, except where it expressly provides otherwise. Sect. 24 prohibits the issue of scrip before provisional registration. That contemplates its issue after it. The only occasion for these Companies being completely registered

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(a) 9 M. & W. 252.

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is, when they cannot be carried into execution without the authority of that act. The object of the Company is not a conclusion of law, but of fact.

Pashley, in reply.—It is clear that *Alderson*, B., in *Young v. Smith* (a), did not advert to sects. 58 and 66 (b), when he said that he could find no allusion in any section, after the 25th, to a Railway or other Company excepted out of the interpretation clause. He cited also *Parsons v. Spooner* (c).

Cur. adv. vult (d).

(a) Ante, p. 148.

(b) Sect. 58 provides for the registration of Companies existing on the 1st November, 1844, "whether incorporated by act of Parliament or by charter, &c."

Sect. 66 gives effect to judg-

ments obtained against any Company completely registered, "except Companies incorporated by act of Parliament or charter, &c."

(c) Ante, p. 163.

(d) See the four next cases.

LOONIE v. OLDFIELD.

June 13.

THIS was an action for money paid, and work and labour, as a broker, in purchasing shares and scrip certificates in certain railway undertakings, and on an account stated.

Plea.—That, after the passing of the 7 & 8 Vict. c. 110, and after the 1st of November, 1844, the plaintiff, as broker and agent of the defendant, purchased, on his account, scrip shares in a certain joint-stock Company, called &c., the formation of which was commenced after the 1st of November, 1844, and established in England for the purpose of profit, and which was a joint-stock Company according to the definition and within the provisions and true intent and meaning of the said act, (setting out the particulars as before, and negating the exceptions in sect. 2); and that the money was advanced and commission earned, and the ac-

count stated, in and about the purchase of such shares, before the complete registration of the said Company, and without any certificate of complete registration; and that no authority of Parliament had been obtained for carrying into execution any works of the said Company; of all which the plaintiff had notice; which purchase was contrary to the statute.

Replication:—That the Company was a Company for executing a work, which cannot be carried into execution without obtaining the authority of Parliament.

Demurrer to the replication, because it does not shew why the work cannot be carried into execution without the authority of Parliament.—Joinder in demurrer.

Cowling, in support of the demurrer, contended that the object of the Legislature, in sect. 26, with respect to all Companies, could not be carried out without the full disclosure of the particulars required by that section, and complete registration. That it applied as much to Railway Companies as sect. 24. That if the 25th and 26th were read as one section, as in the Parliament Roll, there could be no doubt of the application of the latter section to them, as the commencement of the 25th clearly does so, though at the end it makes special provision for them. That, therefore, the general necessity for complete registration applies to Railway as well as other Companies, or the statute does not apply to Railway Companies at all.

He also contended, that it was not sufficient in the replication to state that the railway could not be carried into effect without the authority of Parliament, without stating the reason; and that there was nothing to shew that it was ever intended that an act of Parliament should be procured in this case. And that the plea was good in form, because it sought the Company within sect. 26, by shewing it was established for the purpose of profit, and that it sufficiently negatived the exceptions, by shewing that no act of Parlia-

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ment been obtained. He cited 1 Saund. 233, n. 2, and *Elliott v. Blake* (a).

Martin, contra.

Cur. adv. vult.

June 13th.

EADON v. BRAMSON.

THE pleadings in this case were similar to those in *Loonie v. Oldfield*.

Pashley, in support of the demurrer.—The Court of Exchequer, in *Young v. Smith* (b), were wrong, in assuming that the question turned on the necessity of a Railway Company being completely registered. [*Patteson*, J.—They may obtain a certificate of complete registration, as appears by sects. 9 and 25. The latter provides that a Parliamentary Company, on complete registration, and before they shall have obtained an act, shall only exercise the power of the act conditionally. You wish to read “or” for “and;” besides, sect. 25 provides for putting an end to the power of this act, by the Company obtaining their own.]

Then this is not a penal but remedial act: *Tanner v. Warren* (c), *Bones v. Booth* (d), *Holloway v. Hewitt* (e), cited in *Lord Selsea v. Powell* (f), *Lord Spencer v. Swannell* (g).

As to the plea being good, he cited *Spieres v. Parker* (h), *Shaw v. Pointer* (i), *Doe d. Payne v. The Bristol and Exeter Railway Company* (k), *Taylor v. Clemson* (l), and *Thibault v. Gibson* (m).

(a) 1 Lev. 88.

(b) Ante, p. 135.

(c) 2 Str. 1079.

(d) 2 W. Bl. 1226.

(e) 2 Selw. N. P. 1222.

(f) 6 Taunt. 297.

(g) 3 M. & W. 154.

(h) 1 T. R. 141.

(i) 2 A. & E. 512.

(k) Ante, Vol. 2, p. 75; 6 M. & W. 320.

(l) Ante, Vol. 3, p. 65; 2 Q. B. R. 978.

(m) 12 M. & W. 88.

in, contra.—The plea only says, that the Company completely registered, not that it had not obtained an Act of Parliament. The fraud is on the defendant, who is to avoid paying for the scrip, if fraud was what was intended to be provided against by the 7 & 8 Vict. c. 110.

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Cur. adv. vult.

O'NIEL v. BRINDLE.

June 13th.

The pleadings in this case were similar to those in *Lawson v. Hickman*, except that the plea omitted to state that the Company was not a banking company, or school, or library, or literary institution, according to the exceptions in the 1st section.

The counsel, in support of the demurrer.

in, contra.—The plea is bad for not negating the facts, and the defect is not cured by pleading over. See *Farnworth v. The Bishop of Chester (a)*.

Cur. adv. vult.

RAY v. HIRST.

June 13th.

The same pleadings as in *O'Niel v. Brindle*.

The counsel, in support of the demurrer.

in, contra. See *Bayley*.

Cur. adv. vult.

(a) 4 B. & C. 555.

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Lord DENMAN, C. J., now delivered the judgment of the Court.—In *Lawton v. Hickman*, the first of these cases, a declaration for goods and chattels sold and delivered and money due on an account stated, the plea is, that the said goods and chattels were and are shares in the capital stock of a joint-stock Company, illegally sold and delivered by the plaintiff to the defendant, by the delivery of scrip certificates after the 1st November, 1844, contrary to the provisions of the statute, and that the account stated relates to the said illegal sale and delivery. The plea further states, that the said Company was, before and at the time of the said sale and delivery, a joint-stock Company, established in England for the purpose of profit to the shareholders, subscribers and members thereof, and not a banking company, school, scientific or literary institution, or friendly society, or business society; and that it was a partnership whereof the capital was agreed to be divided into shares, so as to be transferable without the express consent of the co-partners; that it was not incorporated by charter or statute; that the formation of it was commenced after the 1st November, 1844; that it had not, at any time before the said sale and delivery, obtained a certificate of complete registration; and that the plaintiff, before and at the time of the said sale and delivery, claimed to be entitled to the said shares, and sold and delivered them to the defendant as being so entitled. The replication then seeks to bring the Company within the provisions contained in sect. 2 of the act, alleging that it was established for the purpose of making and maintaining a certain railway, to be called “The Grand Union Railway,” under the authority of an act of Parliament to be obtained for that purpose, with the usual powers to take land for the purpose of the said railway, to take tolls, and other powers usually granted by Parliament to Railway Companies; that the purposes of the said Company and the said railway could not be carried into execution without first obtaining the authority of Parliament; and that the Company was

Company for executing a railway, within the stat. 7 & 8 Vict. c. 110, containing the said proviso; and avers, that, within twelve months next before the said sale and delivery, the said Company was provisionally registered, and obtained certificate of provisional registration pursuant to that statute.

A special demurrer assigned for causes, first, that the circumstance of the said Company being established for the purposes in the replication mentioned, did not make the sale legal. The second cause of demurrer is, that, consistently with the replication, the railway might be carried into execution without the authority of Parliament, as the powers required for its execution are not specified; and that the description of the Company in this respect is too general, and is in issue matter of law. To this the answer is, that that description follows the words of the act; that some of the objects of the Railway Company, for which the authority of Parliament is requisite, are set out in the replication; and, further, that we, like the Court of Exchequer, are so familiar with the nature of Railway Companies, that it would be irrational to decline taking judicial notice of them, and the necessity for their obtaining such authority.

The third cause of demurrer is, that the execution of a railway is not said to be the sole purpose of the Company: but we think that this is not necessary. The proviso does not in terms require it to be for that sole purpose, and the Court will not assume that it may have been created for any other. This, indeed, is not impossible; but if a Railway Company is challenged as illegal because it moreover contemplates some other purpose, that ought to be averred by those who so impeach it.

We think there is nothing in the last objection, that railway shares are not goods and chattels.

I revert now to the first cause of demurrer, which fairly raises the question, whether the circumstance, that the Company was established for the execution of a railway requir-

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ing authority of Parliament, prevents the 26th section from rendering the sale of shares illegal. Now, the proviso in section 2 is most remarkable in its terms, as they directly prevent the act from attaching on "any Company for executing any railway which cannot be carried into execution without the authority of Parliament, except as in the said act is specially provided." The act, therefore, does not operate upon such Company at all, unless there is some special provision, and then only *as* may be specially provided. This is not a proviso in the ordinary sense, something engrafted on a preceding enactment, but it is something which prevents any enactment of the statute from operating on such Companies except in a particular case. And that case is not the occurrence of any extrinsic fact which must have been brought before the Court by pleading, but it depends entirely on the contents of the act itself, which the Court is bound to examine and construe, and decide for itself, whether a special provision is to be found within it, and whether such special provision applies to the matter in hand. The proviso must have the same force in reference to every enactment, as if it were repeated at the close of each. Therefore, though the word "provided," and the position of the clause would appear to bring it within the rule, that, as a proviso, it ought to be specially pleaded, it is, in truth, an exception, or rather a statutory declaration overriding the whole act, that to such Companies the respective enactments shall not extend, unless we discover in the act the special provision which would make them applicable.

We have carefully gone through the sections in which special provisions are made with respect to Railway Companies; several of which, the 4th, 7th, and 9th, were not brought to the notice of the Court of Exchequer in the argument in the case of *Young v. Smith (a)*. But the result of our investigation is, that they are not special

(a) Ante, p. 135.

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provisions, which, by necessary implication, apply the 26th section to Railway Companies. The 25th section was fully commented upon, and was said to prove that the 26th must have been intended to apply to Railway Companies as well as others. And there is some weight in the argument from intention, though Mr. Baron *Alderson* thought that different classes of Companies are contemplated by the two sections. But if we consider the 26th section, making it penal to deal in shares before complete registration, to be accompanied with the paramount enactment that it shall extend to no Railway Companies except as by the act is specially provided, we are driven to search for this special provision, and, finding none, to say that that section does not extend to them.

Whether this was intended by the Legislature, we do not profess to give any confident opinion. That they meant to deal differently with ordinary joint-stock Companies and with Railway Companies, can admit of no doubt. A special provision to the effect of invalidating sales of shares before complete registration may have been omitted through an oversight, or possibly from design. It is enough for a Court of law to say that it is omitted; and the consequence is, that the plaintiff is entitled to our judgment.

In *Loonie v. Oldfield*, the declaration was for money paid and work and labour, as a broker, in purchasing shares and scrip certificates in certain railway undertakings, and on an account stated. Plea, that, after stat. 7 & 8 Vict. c. 110, and after the 1st November, 1844, the plaintiff, as broker and agent of the defendant, purchased on his account scrip shares in a certain joint-stock Company, called "The London, Worcester, and Rugby Railway Company," the formation of which was commenced after the said 1st November, and established in England for the purpose of profit, and which was and is a joint-stock Company, according to the definition, and within the provisions and true intent

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and meaning of the said act, (setting out the particular and negating the exceptions in sect. 2): and that money was advanced and the commission earned, and account stated in and about the purchase of such shares before complete registration of the said Company, without any certificate of complete registration, and authority of Parliament had been obtained for carrying into execution any works of the said Company, of all which the plaintiff had notice, which purchase was contrary to the statute. Replication, that the said Company was a Company for executing a work which cannot be carried into execution without obtaining the authority of Parliament. 'This replication is demurred to, because it does not shew why the works cannot be carried into execution without authority of Parliament. But we are of opinion that sufficiently appears on the whole record to be a Railway Company; and we may properly take notice, that a Railway Company cannot be carried into execution without authority of Parliament, as we have already stated in the former case.

In *Eadon v. Bramson*, a similar replication to a simple plea is demurred to for the same cause.

In *Ray v. Hirst*, the plaintiff is clearly entitled to judgment, because the exceptions in sect. 2 are not negated in the plea.

In *O'Neil v. Brindle*, there must be judgment for the plaintiff; because, though the plea avers that the Company was such a one as required to be registered under the act, it does not shew why, and is too general even on general demurrer.

In each of these cases, therefore, there must be judgment for the plaintiff.

Judgment accordingly

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DEBT to recover £1000, for and in respect of the plaintiff having, and who had, for defendant and at his request, before that time, caused divers advertisements, statements, and matters to be inserted and published in divers newspapers and other publications, and which were accordingly inserted and published therein; and also for work, labour care, diligence, and attendances, by the plaintiff at the defendant's request before that time done, performed, and given in and about the inserting and causing to be inserted in divers newspapers and other publications, of divers

The mere fact of a person agreeing to become a member of a provisional committee amounts to no more than a promise that he will act with other persons appointed or to be appointed for the purpose of carrying some particular scheme into effect.

But if he authorises his name to be inserted in a particular prospectus, it is a question for the jury to say what inference a reasonable man would draw from the terms of the prospectus. If it state merely the name of the provisional committee, and nothing more, that circumstance does not alter the liability; but if it state the names of the acting committee also, the question is, whether it means that the latter are to take the whole management to the exclusion of the former, or that the former have constituted the latter their agents on their behalf, in which case they would be liable for contracts made by such agents. Or if it state the name of a solicitor, the question would be, whether it meant that he was to be employed by those of the committee who acted, or was already appointed by all whose names were mentioned, as their solicitor, to do all solicitor's business on their behalf; and a further question of fact, what was the business at the time of the contract usually transacted by solicitors in such schemes on behalf of the Company; and so as to the secretary.

Such an intended association is not a partnership, as it constitutes no agreement to share in profit and loss, being formed merely for carrying into effect the preliminary arrangements for promoting the scheme.

Therefore, in an action against a provisional committee-man for goods supplied to the order of the solicitor,—*Held*, that the law will not imply, from the mere fact of his agreeing to be one, an authority given by him to every other provisional committee-man to make contracts by himself or the solicitor, nor an authority to the solicitor to make them on behalf of the committee.

But where there is also evidence of the defendant having acted with relation to the proposed scheme, it is a question for the jury, whether, by his consent and acts, he has in fact become a provisional committee-man, and has authorised the solicitor, or secretary, or any member of the committee, to pledge his credit for the necessary and ordinary expenses in forming such a Company; and, if so, whether the work was done, and credit given, on the faith of his being liable.

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advertisements, statements, and paragraphs for the defendant, and for commission and reward due and of right payable to the plaintiff in respect thereof. There were also counts for money paid, and on an account stated.

Pleas: Never indebted, and payment.

At the trial, before *Pollock*, C. B., at the Middlesex sittings after last Trinity Term, it appeared that the action was brought by the plaintiff, an advertising agent, against the defendant, as one of the provisional committee of a Company called "The Central Kent Railway Company," for money advanced and commission in respect of advertisements of that Company, which had been inserted in various newspapers from the 30th of September to the 29th of November, 1845, some of which were necessary in order to enable the Company to apply to Parliament for an act of incorporation. The Company was provisionally registered on the 1st of October, 1845, the promoter being a person of the name of Ord; and a prospectus was issued, in which, and several subsequently, the defendant's name appeared as one of the provisional committee, and Messrs. Park Smith, & Co., of No. 12, Bedford Row, as the solicitors of the Company. No parliamentary agent was stated. It was proved that the defendant, on the 26th of September, had called at the office of Messrs. Parkes & Co., and stated to the clerk in the office that he was willing that his name should be inserted in the list of the provisional committee of the Company; that he made inquiries as to the other provisional committee-men, with whom he expressed his willingness to be associated, and about the intended line of railway, and received a prospectus and map. The prospectus was therefore shortly afterwards issued, in which his name was inserted as one of that committee; but, being inaccurately described, he called at the offices of the Company, in Mission House Place, and requested that the error should be corrected. He afterwards, on several occasions, called at the offices, made inquiries as to the progress of the Company,

and was shewn the prospectuses issued from time to time. He also, in common with the other members of the provisional committee, received the following circular:—

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“ Central Kent Railway Company.

“ 4, Mansion House Place, London.

“ October 15, 1845.

“ Sir,—I am directed to inform you, that, at a meeting of the provisional committee of the above undertaking, held at these offices on the 13th instant, it was proposed and agreed upon, that 150 shares, or any smaller number, be allotted to each member of the provisional committee. Will you, at your earliest convenience, let me know what number of shares you wish to have placed at your disposal, &c.

“ C. P. HACKETT, Secretary.”

The defendant returned the following answer:—

“ 17, St. James's Place, Piccadilly.

“ October 16, 1845.

“ Sir,—I will thank you to inform the provisional committee that I will take the 150 shares in the Central Kent Railway, agreeably to their circular of the 15th instant.

“ K. LEWIS.

“ C. P. Hackett, Esq., Secretary.”

He afterwards sent an advertisement to “ The Times ” newspaper, which was inserted on the 7th of November:—

“ To the Editor of ‘ The Times.’

“ Sir,—As I understand my name has been placed on the committees of three or four railways without my consent or authority, I consider it due to the public, as well as to myself, to state that I have not the honour to be on the committees of any lines save the Central Kent and Middlesex and Surrey Railways.

“ K. LEWIS.

“ London, November 6, 1845.”

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Early in December, the defendant called at the office the solicitors, and recommended that, in the then state of the market, nothing further should be done. He inquired as to the amount of expenses incurred, and expressed satisfaction at their being so small. He never attended a meeting. No managing or allotment committees were appointed, nor were any shares allotted. It was proved that the orders for the work were given by Messrs. Parkes & Co. and that the charges were reasonable.

The Lord Chief Baron, in summing up, directed the jury, on the first issue, to consider upon this evidence whether the defendant, by becoming a member of the provisional committee, authorised the solicitors, or secretary or any member of the committee, to hold him out to the world as responsible for the ordinary and necessary preliminary expenses to be incurred in forming such a Company; and if so, whether his name was so held out accordingly for the work done, and whether the plaintiff gave credit upon the faith of his name. The jury found for the plaintiff for the amount of the work done subsequent to September; and Sir *J. Jervis*, Attorney-General, on the 4th November in this Term, having obtained a rule nisi for a new trial on the ground of misdirection, and of the verdict being against evidence,

Knowles, Crompton, and Willes shewed cause (a).—The ground of this rule was, that it was not left to the jury to say with whom this contract was made. But the direction of the learned Judge was right; for the true question was what liability a man incurs by allowing his name to be held out to the world as one of the provisional committee of a projected Company. It is submitted that he thereby renders himself liable to be sued for all the reasonable

(a) Nov. 20th and 21st, before *Pollock*, C. B., *Parke*, *Alcock*, and *Rolfe*, Bs.

liminary expenses of its formation. Certain persons may make contracts, but there may be other parties bound by their contracts equally with them. Perhaps, strictly speaking, provisional committee-men do not constitute a *partnership*; but they are in many respects *quasi partners*, and their rights and liabilities must be so regulated; in that case they may pledge each other's credit for things necessary to the partnership which exists *inter se*. The *promoters* of a Company are empowered by the 7 & 8 Vict. c. 110, s. 23, to allot shares, receive deposits, and to make such contracts, and perform such acts as are necessarily required for the establishing of the Company; and sect. 3 shews that the provisional committee are "promoters," as the word is to apply "to every person acting, by whatever name, in the forming and establishing of a Company." The fact of their holding out to the world that they have taken upon themselves certain powers, shews an intention to exercise such powers, and a liability to pay for what is necessary to their exercise.

But, independently of the general question of the liability of a provisional committee-man, there is abundant evidence here of acts done by the defendant, which would shew even his intention of becoming a partner, and make him liable as such for these expenses,—as, for instance, his visits to the offices, and inquiry and advice as to the affairs and expenses of the Company, which, coupled with the publication of his name in the prospectus, are sufficient to fix him for the work done in this particular case. [*Parke, B.*—There is evidence here of his allowing his name to be on a list of a provisional committee, having solicitors and a secretary put down on it also; it may be said, that sanctions an authority to them to do all acts which a solicitor or secretary ought to do. The question really is, what was the state of things in September, 1845, when the defendant became a member of this committee? Was such a liability contemplated at that time?] The nature and duties of provisional committee-

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men are familiar to juries as matters of fact. They, in effect, put forth and are answerable for the flourishing prospects stated in the prospectus. *Barnett v. Lambert* (a) is expressly in point, as every objection taken here would have applied in that case, where a provisional committee-man was held liable for stationery supplied to the Company by the order of the secretary. [*Rolfe*, B.—In that case the defendant had acted as chairman of the committee, and had shewn by his expressions that he considered himself liable to some extent by trying to limit it to the amount of his shares. *Alderson*, B.—And the articles supplied there were necessary for the use of the committee.] The defendant here investigated, and was satisfied with the way in which the business had been done, and advised no allotment of shares; so he could not be looking to deposits for the means of paying these expenses. [*Parke*, B.—In *Todd v. Emly* (b), it was held, that subscribers were not liable for the acts of the committee.] The business was supposed to be done there for ready money; here the work may be done on the faith that the future provisional committee will pay for it, and the solicitor, in effect, pledges their credit for it. [*Alderson*, B.—If the provisional committee appoint a managing committee, it may be that those who appointed them would be liable for their acts. But the question is, whether the defendant in this case authorised the solicitor to employ the plaintiff. *Rolfe*, B.—I suppose something is done by the solicitor before the provisional committee is formed; if so, those orders would be given in his own personal character.] By the 7 & 8 Vict. c. 110, s. 6, the solicitor is required to make the returns to the Registry Office of all documents issued by the Company. Advertising is necessary even in the infancy of these schemes; and the defendant, by his conduct in inquiring as to the amount of the expenses, shews that he knew

(a) Ante, p. 308.

(b) 7 M. & W. 427.

by whose order they were incurred, and considered himself liable.

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The order in this case having been given by the solicitor, the contract was in fact made with him, and he is *primâ facie* responsible for the payment; and, in order to make him not liable, it is essential that he should have been acting for somebody else. Then it must be shewn that that person either actually authorised him, or represented himself to the public as doing so, so that the plaintiff acted upon that representation; which would be the same as a real authority given to the solicitor. This must be proved by some other evidence than the simple fact of the defendant being one of the provisional committee. That term appears to have been unknown to the law before September, 1845. Before that time, *Wood v. The Duke of Argyll* (a) had been decided, where a preliminary association was formed for the purpose of establishing a joint-stock Company, of which A. was named president, and B. vice-president. They both signed an agreement to subscribe for a certain number of shares, and to pay a deposit of £5 per share when shares to the amount of £50,000 should have been subscribed for; and they attended two meetings of the association. The Company was never, in fact, formed. C. did certain work, at the request of the secretary to the proposed Company; and, in an action by C. against A. and B., it was held, that the jury were properly told to consider, first, whether there had been a direct contract by A. and B. with C.; secondly, whether A. and B. were members of a partnership; and, thirdly, whether they had held themselves out as such to the public; and that a verdict for the defendants was fully borne out by the evidence. It cannot be said that provisional committee-men are partners, or even *quasi* partners. Such

(a) 6 M. & G. 928; 7 Scott, N. R., 384.

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committees generally are formed of persons in various countries. [*Alderson, B.*—Perhaps various nations.] They may be unknown to and unconnected with each other, and allow their names to be put down only as vouchers for their confidence in the respectability and probable advantages of the scheme. The prospectus does not state them to be partners, nor hold out any pecuniary responsibility on their part. They may perhaps make themselves liable by taking an active part in the management of the concern; in which case it becomes a simple question of principal and agent, as in *Smout v. Ilbery (a)*, and which, in fact, is the only correct mode of considering it. It is impossible to contend that each member of the provisional committee makes the rest his agents for all the purposes of the undertaking. Suppose eleven members attended the committee, and six of them voted for one tradesman being employed, and five for another, or perhaps for not giving any such order: would the minority be liable to the tradesman employed by the majority? Or, if the committee were to add largely to their number, which there is generally power to do, could those subsequently appointed bind the original members? [*Pollock, C. B.*—Does not the 7 & 8 Vict. c. 110, which requires registration in these cases, make a difference?] That act does not mention provisional committee-men. [*Alderson, B.*—It seems to have been intended to regulate the relation between the promoters and shareholders. I do not understand what legal liability arises from a man being a *promoter*. The question is, what has each party done?] In any case, the agency of the solicitor could only be implied as to matters connected with law, not to their debts for advertisements. If this be a question of law, the learned Judge should have directed the jury what the liability was, and not have left it to them to say whether the defendant, by becoming a member of this committee, authorised others to pledge his credit.

(a) 10 M. & W. 1.

If it were a question of fact, the jury should have been directed to find what the duties of a provisional committee-man are. In either case there should be a new trial.

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ASSUMPSIT for goods sold and delivered, goods sold, work, labour, and materials, and on an account stated. Pleas: non assumpsit; and payment.

At the trial, before *Pollock*, C. B., at the London sittings after last Trinity Term, it appeared that the action was brought by the plaintiff, a geographer, against the defendant as one of the provisional committee of the Peterborough and Nottingham Junction Railway Company, to recover the amount of his bill for work done in engraving and printing certain maps, plans, and sections of the projected line of railway. The Company was provisionally registered, under the 7 & 8 Vict. c. 110, on the 4th of September, 1845, with P. Edlin as promoter; and on the 29th a prospectus was registered and issued, in which the defendant's name appeared as one of the provisional committee. The prospectus stated, "that the acting engineer of the Company had carefully surveyed the line, and that the provisional committee had much pleasure in stating, that the merits of the proposed line, and the encouragement and support which they had received from parties locally interested, were such as to induce them to apply with confidence to Parliament in the ensuing session for an act to incorporate the Company; and that the committee reserved to themselves the power of making alterations in the line, increasing the capital," &c. It also stated the name and objects of the Company, the names of the standing counsel, bankers, and engineers, and of the solicitors to the Company, Messrs.

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Walker & Gridley. No parliamentary agent was mentioned. The following documents were also proved:—

1. “ 25, Bedford-square, 27th Sept., 1845.

“ My dear Sir,—I find you have my name in the list of your committee as director of the Staffordshire Potteries, and Manchester Direct. I am upon the provisional committee of the former, but the directors are not yet chosen: with the latter I have nothing whatever to do. At any rate oblige me by having the former rectified.

“ Yours very truly,

“ J. D. HOPKINS.

“ P. H. Edlin, Esq.”

2. A letter, dated 9th October, 1845, from a person who requested to have 100 shares in the Company allotted to him, and gave a reference to the defendant. At the foot of this was written by the defendant, “ Highly respectable, and responsible for the whole number applied for.—J. D. HOPKINS, M. P. C.”

3. A letter from the solicitors to the defendant, as follows:—

“ Peterborough and Nottingham Junction
 Railway Company’s Office.

“ 5, Southampton-street, Bloomsbury-square, London.

“ Oct. 8, 1845.

“ Sir,—We have the honour, by desire of the managing directors, to inform you, that it has been resolved to give each member of the provisional committee the option of taking 100 or any less number of shares in this undertaking, provided such option be made known to us in writing on or before Tuesday next, the 19th instant, and in case of default the shares will be otherwise applied.

“ WALKER & GRIDLEY.

“ J. D. Hopkins, Esq.”

4. The defendant's answer, as follows:—

“ 25, Bedford-square, 10th Oct., 1845.

“ Gentlemen,—Have the kindness to allot me the full number (100 shares) allowed the provisional committee.

“ J. D. HOPKINS.

“ Messrs. Walker & Gridley.”

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The managing committee, of which the defendant was not one, were appointed in the first week in October, but did not appear to have been registered. They held frequent meetings; but the defendant never attended any of the meetings, or interfered in any manner in the affairs of the Company, which were afterwards wound up without going to Parliament. The order for the work in question was given by Mr. Gridley early in November, and the employment of the plaintiff by him, and the correctness of the account, were not disputed.

The Lord Chief Baron, in summing up, left three questions to the jury: First, Whether they believed that the defendant authorised his name to be used as a member of the provisional committee? Secondly, Whether he intended to authorise his credit to be pledged for the necessary expenses of the Company? Thirdly, Whether the work was done, and on the credit of the defendant?

The jury having found for the plaintiff for the full amount, *Watson*, in this Term, (Nov. 7), obtained a rule nisi for a new trial, on the ground that there was no evidence to go to the jury.

Martin and *Willes* shewed cause (*a*).—First, it is contended, that, by allowing his name to be placed on the provisional committee, the defendant became a member of a quasi partnership, and authorised the pledging of his credit for the expenses allowed by the 7 & 8 Vict. c. 101. It is clear that under that act such a committee is the body act-

(*a*) Nov. 21st and 23rd, before *Pollock*, C. B., *Parke*, *Alderson*, and *Rolfe*, Bs.

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ing in the formation of the Company, and to whom the formation is committed, according as the object of it is final or prospective; provisionally, in the case of a railway, in the sense of the 4th section, that is, temporarily, until an act of Parliament is obtained. All the members of such a committee therefore form either an actual partnership, in which case their liability would be implied by law, or a quasi co-partnership, limited and imperfect, in which the liability would be a mixed question of law and fact. They are united for a common object, knowing that expenses will be incurred in it, and making no provision for paying them; they therefore give authority to each other to pledge their credit for things bonâ fide necessary for carrying out the common object. If the partnership be general, they may bind each other generally; if limited, then only to the limited extent, that is, to the extent of the special purpose for which they are united. [*Parke, B.*—It is too strong a proposition to contend, that all persons associating for a common object make each other their agents for every thing necessary to that object. That is going further than has ever been held even in an acknowledged partnership.] In *Holmes v. Higgins* (a), where a number of persons associated together and subscribed money for the purpose of obtaining a bill in Parliament, *Abbott, C. J.*, said, that the members of the association were *partners*. [*Parke, B.*—It would have been much better if he had said *joint-contractors* instead of *partners* (b): there was no community of profit and loss. Besides, there they subscribed money. That is only a step; there can be no difference between a man who has subscribed and one who is to subscribe money.] Again, in *Nockels v. Crosby* (c), *Littledale, J.*, lays it down as a general principle, that, “if persons set a scheme afoot and assume to be the directors or managers, all the expenses incurred before the scheme is in actual operation

(a) 1 B. & C. 74.

his Lordship is “co-subscribers.”

(b) In the report of the case in 2 D. & R. 196, the word used by

(c) 3 B. & C. 814.

in the first instance, be borne by them." That case each discussed in *Walstab v. Spottiswoode* (a), and acted by this Court. *Money Penny v. Hartland* (b) supports the same principle. In *Barnett v. Lambert* (c), under circumstances very similar to the present, Alderson, B., says, a jury would be justified in finding that a member of a provisional committee had constituted the secretary his agent to pledge his credit for all things necessary for the carrying on of the provisional committee, and to enable it to go on. Secondly, if there is any difficulty in ascertaining the liability of these committees, they are well known to be matters of fact, and ought to have been so left to the jury to determine in this case. The becoming a member of a committee, and holding himself out to the world as such by allowing his name to be published, is at least evidence for the consideration of the jury that he gave the committee authority. But, thirdly, there is abundant evidence here to make the defendant liable by his conduct in this case. Besides his application for shares and recommendation of another applicant in his capacity of provisional committee-man, he allows his name to be attached to a prospectus announcing that an application would be made to Parliament for an act, and that he was one of the committee at that object. That is as much evidence against him as if he had been present at the order, and said so. [*Alderson*.—Yes, the putting his name down is as if he spoke with authority.] As to the order being given by the solicitor, the meetings took place at his office; and in fact it is the practice for solicitors in such Companies to take care that everything is prepared for complying with the Standards and going to Parliament.

Antè, contra.—In this case it is not suggested that there was any direct contract with the defendant, nor any authority given by him to the solicitor to pledge his

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Antè, p. 321.

(b) 1 C. & P. 352.

(c) *Antè*, p. 308.

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credit. There are therefore two questions for consideration: first, what is the effect of an agreement to become provisional committee-man? secondly, what is the effect of the defendant putting his name to this prospectus?

As to the first question, no doubt when a partnership is satisfactorily established, the rules of partnerships apply, a matter of law. But for that purpose there must be a community of profit and loss, and even then the power of one to bind the other by his contracts is limited by reference to the nature of the undertaking. Thus, attornies in partnership have no implied authority to bind each other by drawing bills: *Hedley v. Bainbridge* (a). Nor have the members of a mining Company any such authority: *Dickenson v. Valpy* (b). It is contended on the other side, that whenever persons engage in a common purpose, they authorise each other to bind them for the objects of the undertaking. But that would not be so in the case of the members of a club, or an association to drain a swamp, build a church or a hospital, or remove a nuisance. So with committees for repealing the laws, converting infidels, or establishing a prize essay for such purposes. In all these cases a prospectus would be published, but nobody could pretend that the members meant to pledge their credit to any extent for carrying out these objects. The term "provisional committee-man" has no *legal* meaning, any more than that of "consulting council," in *Wood v. The Duke of Argyll* (c) [*Parke, B.*, referred to *Brandão v. Barnett* (d).] At all events, the holding oneself out as a provisional committee-man can involve no greater liability than the being one.

Secondly, this prospectus amounts to no more than a voucher for the respectability of the scheme, and the encouragement received for going to Parliament, and its probable advantages. It recognises no authority to the individuals composing the provisional committee to pledge

(a) 3 Q. B. R. 316.

N. R., 885.

(b) 10 B. & C. 128.

(d) 1 M. & G. 908.

(c) 6 M. & G. 928; 7 Scott,

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each other's credit, nor indeed to that committee generally, being a fluctuating body liable to constant change. But if it did, it would only extend to necessities; and though the solicitor might be bound to take care that all such were provided previously to going to Parliament, he could have no right to pledge his client's credit to a third person for them, any more than for the employment of a stationer, or Court fees: *Robins v. Bridge* (a). He would not have been liable for negligence if he had not given these orders and provided the maps and surveys. In *Holmes v. Higgins* (b), the subscription of money and the responsibility for an uncertain sum made a virtual partnership. The other cases cited depended on their own peculiar circumstances. Then the statute 7 & 8 Vict. c. 110, has for its sole object the registration of these Companies; and, by sect 3, the term "promoter" is to apply to every person *acting* in the formation of a Company. The defendant in this case has never *acted*. Sect. 23 shews what the promoters may and may not do, but leaves the question of liability where it was.

Cur. adv. vult.

POLLOCK, C. B., now delivered the judgment of the Court.—We have considered the two cases which were argued before us, of *Reynell v. Lewis* and *Wyld v. Hopkins*, and give our judgment in those only; but we think it right to state fully the principles on which our judgment proceeds.

The question in all cases in which the plaintiff seeks to fix the defendant with liability upon a contract express or implied, is, whether such contract was made by the defendant, by himself or his agent, with the plaintiff or his agent: and this is a question of fact for the decision of the jury upon the evidence before them. The plaintiff, on whom the burden of proof lies in all these cases, must, in order to

(a) 3 M. & W. 114.

(b) 1 B. & C. 74.

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recover against the defendant, shew that he (the defendant) contracted expressly or impliedly:—expressly, by making a contract with the plaintiff;—impliedly, by giving an order to him under such circumstances as shew that it was not to be gratuitously executed;—and if the contract was not made by the defendant personally, it must be proved that it was made by an agent of the defendant properly authorised, and that it was made as *his* contract.

In these cases of actions against provisional committeemen of railways, it often happens that the contract is made by a third person: and the point to be decided is, whether that third person was an agent for the defendant for the purpose of making it, and made the contract *as such*. The agency may be constituted by an express limited authority to make such a contract, or a larger authority to make all falling within the class or description to which it belongs, or a general authority to make any; or it may be proved by shewing that such a relation existed between the parties as by law would create the authority; as, for instance, that of partners, by which relation, when complete, one becomes by law the agent of the other for all purposes necessary for carrying on their peculiar partnership, whether general or special, or usually belonging to it; or the relation of husband and wife, in which the law, under certain circumstances, considers the husband to make his wife an agent. In all these cases, if the agent, in making the contract, acts on that authority, the principal is bound by the contract, and the agent's contract is his contract; but not otherwise. This agency may be created by the immediate act of the party; that is, by really giving the authority to the agent, or representing to him that he is to have it, or by constituting that relation to which the law attaches agency; or it may be created by the representation of the defendant to the plaintiff that the party making the contract is the agent of the defendant, or that such relation exists as to constitute him such; and if the plaintiff really makes the

contract on the faith of the defendant's representation, the defendant is bound; he is estopped from disputing the truth of it with respect to that contract; and the representation of an authority is, quoad hoc, precisely the same as a real authority given by the defendant to the supposed agent. This representation may be made directly to the plaintiff, or made publicly, so that it may be inferred to have reached him, and may be made by words or conduct.

Upon none of these propositions is there, we apprehend, the slightest doubt; and the proper decision of all these questions depends upon the proper application of these principles to the facts of each case, and the jury are to apply the rule with due assistance from the Judge.

There are few, if any, of these cases, in which it is contended, that authority was directly given, by the defendant to the party making the contract, to make it for the defendant; rarely has that circumstance been proved by direct testimony—in one it was said, that it was to be inferred from a conversation in which the defendant expressed his satisfaction that the expenses were moderate. That was evidence of the fact for the consideration of the jury, entitled to more or less weight according to the other circumstances of the case. But it is contended, (and that formed the chief part of Mr. *Martin's* argument, and a part of that of others), that the relation of co-provisional committeemen constituted an association or a quasi co-partnership, in which one was agent for the other, for the purposes of all preliminary proceedings necessary to enable them to obtain an act: or that the fact of their being co-promoters of the scheme, coupled with the fact that no money was supplied for the expenses of it, was evidence to go to the jury, that each authorised the other to contract for those purposes, on his behalf and that of the other promoters—it was insisted, that, where there was no other evidence than the mere fact of the defendant having already agreed to be a provisional committeeman, there was a sufficient case, or at least a case

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for the consideration of the jury, to prove an authority given by the defendant to every other committee-man to give the order out of which the contract arose, by himself, or by the solicitor or secretary, or an authority to such solicitor or secretary to give it on behalf of the committee.

We think that no such consequence follows as matter of law from the *mere* fact of the defendant agreeing to be a provisional committee-man—such an agreement amounts to no more than a promise that he would act with other persons appointed or to be appointed for the purpose of carrying some particular scheme into effect. The term “committee” means an individual or a body to which others have committed or delegated a particular duty, or who have taken on themselves to perform it, in the expectation of their acts being confirmed by the body they profess to represent or act for—an agreement to be a committee-man is an agreement to become one of that body. The schemes may be various—to establish an hospital or place of emigration, to which persons are to subscribe merely from charitable motives; or partly from these motives, partly from others; or a proprietary school, or literary institution, or assembly-room, in which they are to be beneficially interested as shareholders; or to obtain an act for a bridge, drainage, railroad or canal:—but whatever the objects may be, it seems to us to make little or no difference in the position of the person agreeing to act as a committee-man. If the object of some, most, or all, is gain to themselves *individually*—the legal consequence is the same as if the object of the parties were the most charitable and benevolent; though the result may be practically very different, in exciting an improper prejudice in the minds of a jury when the evidence is laid before them for their consideration. Such an intended association constitutes no agreement to share in profit or loss—which is the characteristic of a partnership: it would be absurd to suppose that such a relation could be meant to be created by any of those who consented to act—could it be imagined

that a person would agree to be a partner, not only with those who were then named committee-men, but any that should afterwards be named by themselves, or by the projector of the Company; and could those, who subsequently agreed to become members, suppose that those previously named could ever have so intended? The truth is, the agreement to become a provisional committee-man means neither more nor less than what the words express, viz. an agreement to act on the provisional committee in carrying into effect the preliminary arrangements for petitioning Parliament for a bill, and so to promote the scheme. If afterwards the provisional committee-man does act, he is responsible for his acts.

But there are other cases in which the question does not assume so simple a form: and where there is evidence, that the defendant has not only consented to be a provisional committee-man, but has authorised his name to be inserted in a prospectus, not generally, but a particular prospectus, in which in some cases certain persons are described as the *acting* committee; in others solicitors are named, or engineers, or a secretary. If such a prospectus has been so publicly circulated, with the defendant's consent, that the jury would presume the plaintiff knew of it, or if the plaintiff has had it shewn to him, at or before the time of making the contract, and has in either case acted upon it in making the contract, the question is, what inference ought a reasonable man to draw from the contents of that paper.

This must of course depend upon the terms of each particular prospectus. If the prospectus state merely the names of the provisional committee and nothing more, and no light can be derived from the context, that circumstance does not alter the liability of the defendant. If not responsible as being one of that committee in fact; he cannot become so by the representation of the fact. If it state the names of the *acting* committee also, where that has been appointed, is the meaning that the *acting* committee is to

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take the whole management to the exclusion of the provisional committee, their provisional character having ceased, in which case the provisional committee would not be liable? or does it mean that the provisional committee-men have appointed the acting committee, or the majority of it *on their behalf, and as their agents*, in which case they would be liable for the contracts of the acting committee, or the majority, made as such agents? Again, does it mean, when the solicitor's name is mentioned, that such person would be regularly employed in that character, by those of the committee who acted, or that he was already appointed by a person whose names are mentioned, as their solicitor, to do all solicitor's business on their behalf? and then would arise further question, what was the business, *at the time of the contract*, usually transacted by solicitors for Companies intending to obtain an act of Parliament, and on behalf of the Company?—which is a question of fact to be proved by evidence. The same remark applies to the appointment of a secretary.

Applying these observations to the two particular cases before us, we think that in that of *Reynell v. Lewis*, there was some evidence to go to the jury of the employment of the plaintiff, and that there was no misdirection; but we think that we ought to grant a new trial on payment of costs, in order that it may be submitted to another jury, and fully considered by them, upon the principles above laid down. In the other case of *Wyld v. Hopkins*, we entertain so much doubt whether there was any evidence at all to go to the jury, that we think there ought to be a new trial generally, without the condition of the payment of costs.

Rules absolute accordingly.

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COURT OF REVIEW.

Ex parte BARTON re CHARLES.

May 6th.

THIS was the petition of J. Barton, (a stock-broker), praying for leave to go before the Commissioner to prove for a sum of £350, being the amount of the loss which he had sustained by the sale of fifty shares in the Boston, Newark, and Sheffield Railway Company, in consequence of the decrease in their value since the date of purchase. The petition stated, that, in October then last, the petitioner had received written instructions from C. to purchase, and he did accordingly purchase for him fifty shares in the above-mentioned Company, which was then only provisionally registered: but payment for the shares not having been made on the appointed day, the scrip was sold on a subsequent day at the above-mentioned loss: that a fiat was issued on the day after such sale against C.; and that the Commissioner had refused to allow the petitioner to prove for his loss.

A broker, by order of a customer, purchased certain scrip shares in a projected Company provisionally registered, but the purchase-money not having been paid on the settling day, the broker sold them again at a loss. The customer having become bankrupt, the broker applied to prove for the loss, but was refused by the Commissioner. On application by petition to the Court of Review, the petitioner was allowed to go before the Commissioner to establish his proof.

Mr. *Russell*, in support of the petition.

Mr. *Bacon* and Mr. *Rolt*, contra.—There is no value received in this case by the bankrupt, nor any contract by which the petitioner has acquired any right to claim his loss out of the estate. The Joint Stock Companies Registration Act (a) particularly declares all such transactions

(a) 7 & 8 Vict. c. 110.

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as these to be illegal; for it declares, that, until the Company is completely registered, and the subscriber shall have been duly registered as a shareholder, it is not lawful to dispose of any share or interest in the Company by sale or mortgage (*a*).

THE CHIEF JUDGE.—This is a question on a proof for a small sum claimed under a transaction alleged to be illegal by the operation of provisions in a statute passed in 1844, the interpretation of which is open to a difference of opinion. The burthen of establishing that illegality rests on those who assert it. The only case produced is one decided in January last, by three of the Barons of the Exchequer, in favour of the legality of a transaction resembling the present (*b*). Upon a mere question of proof, I certainly should hesitate in giving an opinion on such an act of Parliament; but, without forming any opinion upon the act, it will be better to abide by the Exchequer decision, and I give no opinion. It certainly is a difficult and doubtful question. I shall therefore allow the petitioner to go before the Commissioner to establish his proof: the statute not to be treated as rendering the transaction illegal, and the alleged absence of value not to affect the right of proof. The costs must be allowed out of the estate.

(*a*) Vide contra, *Hewitt v. Price*, ante, Vol. 3, 175.

(*b*) *Young v. Smith*, ante, p. 135.

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COURT OF CHANCERY.

BEFORE THE V. C. OF ENGLAND.

FERNIHOUGH v. R. LEADER and Others.

May 14th.

THE bill stated, that in August, 1845, eight persons who were all named as defendants) agreed to promote the formation of a railway, "The Great Grimsby, Sheffield, the Potteries, and Grand Junction Railway," and for that purpose undertook the formation of a company, the capital whereof (according to the prospectus) was to consist of £1,750,000, in 70,000 shares of £25 each, and was to be formed according to the provisions of the Joint Stock Company's Act(a). That the defendants (the promoters) obtained a certificate of provisional registration, and, after obtaining the certificate, duly opened subscription lists, and proceeded to allot shares in the Company.

That, in the month of October, 1845, plaintiff applied for, and had ten shares allotted to him in the Company; and he agreed, in writing, to take the shares, and thereby became, and then was, a subscriber to, and a partner in, the

The plaintiff, who was a shareholder in a projected railway company, but who had refused to pay £100, a sum fixed by the executive committee as his share of the expenses incurred, filed his bill to restrain a creditor of the Company from prosecuting an action at law against him to recover a debt, in the bill stated to have been assigned to the Committee, in order that they might use it as a means of com-

elling payment of the £100, and also to restrain the executive committee of the Company from commencing any action against him or parting with the deposits in their hands, except in payment of the liabilities of the Company; and praying that accounts might be taken of the assets and liabilities, plaintiff offering to pay what might properly be found due by him.

The managing committee (all of whom, together with the creditor, were defendants) demurred for want of equity, and for want of parties:—*Held*, that, although a plaintiff may have a good defence to an action at law, he is not on that account precluded from proceeding in equity to restrain the action.

That the defendants must distribute the assets in their hands in discharge of the liabilities of the Company, and were not justified in attempting to extort by means of an action an arbitrary sum, which the directors had fixed as plaintiff's share of the expenses. Demurrer overruled.

(a) 7 & 8 Vict. c. 110.

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Company, and the several defendants (the promoters) had also become, and then were partners therein.

That the plaintiff did not interfere in the management of the Company; but defendants (the promoters) were duly appointed members of the committee, called the "Executive Committee," and in that character were authorised to receive and take charge of the monies, and to manage the affairs of the Company, in conformity with the terms of the prospectus.

That the defendants had got into their hands, and had then in their possession, a large sum, constituting the partnership assets, and applicable to the discharge of its liabilities, amounting to £30,000, and that they had thereout paid £11,550; and that the defendants ought to discharge out of the balance the existing debts of the Company, but which they refused to do.

That, in consequence of such refusal on the part of the defendants, the several persons to whom such outstanding debts were owing, threatened and intended to proceed at law against the plaintiff as one of the partners in the Company, and to compel payment by plaintiff personally of their debts.

That, among the outstanding debts of the Company, was a debt due to the defendant R. Leader, and a debt due to J. P.

That the balance in the possession of defendants was in their possession as trustees of the Company, for the purpose of applying the same in discharge of the said two debts, and of the other outstanding debts of the Company.

That a considerable portion of each of the debts originally owing to R. Leader and to J. P., had been paid off by the other defendants, and the residue of said debts had been deposited by the defendants in the hands of agents nominated by, or on behalf of, R. L. and J. P. respectively; and such debts had been assigned by them to the other defendants.

at R. Leader, notwithstanding such payment and discharge, at the request of the other defendants, brought an action against the plaintiff for his debt, as a trustee for the other defendants, and had been guaranteed and indemnified by them against all costs and other risks to be incurred by such action, or by the same being brought by any of several co-contractors, or otherwise; and the said plaintiff had also, at the request of the defendants, demanded payment of his debt from plaintiff.

That plaintiff had frequently applied to all the defendants and requested them to refrain from suing him, or obliging him to be sued; and had, in like manner, applied to the defendants, other than R. Leader, and requested them to discharge all the outstanding liabilities of the Company out of the balance in their hands, but the defendants refused to comply with either of said requests unless plaintiff would pay £100 over and above the deposit on plaintiff's behalf; and the defendants availed themselves of the action for the purpose of indirectly compelling plaintiff to pay the sum which he had refused to pay.

That plaintiff had further applied to the defendants and requested them to retain the balance in their possession, so that the outstanding liabilities of the Company remained unpaid, in order that they might have the means of satisfying the outstanding liabilities; but they had refused so to do, and, on the contrary, intended to distribute the balance on the 15th of May, then instant, among themselves and the persons whom they alleged to be members of the Company, leaving the outstanding debts of the Company unpaid, and making plaintiff liable to be personally proceeded against by the creditors for payment thereof.

The bill charged that Messrs. B. & H., who were the solicitors for the Company, and were also acting in the prosecution of J. P.'s claim against the plaintiff, issued a writ against the plaintiff at the suit of R. Leader, as trustee for

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the other defendants, to recover his debt, amounting 160*l.* 16*s.*

That the other debts of the Company left unpaid had been so left unpaid, in order that the defendants, other than R. L., might sue plaintiff in the name of the creditors whom the same were owing, and might thereby indirectly compel payment of the sum of £100.

That plaintiff never acted or interfered as a member of the provisional committee, or at all in the management of the affairs of the Company.

That the balance in the hands of the defendants was sufficient for answering the debts and liabilities of the Company; and the bill charged that defendants should furnish an account of debts, and of the number of shares, amount of deposits, and a list of the names of all persons to whom monies had been paid; and that defendants sometimes alleged that there were other persons partners in the Company, whose names and addresses they knew, amongst whom they intended to distribute the balance in their hands, and who were interested in the balance of partnership assets of the Company; and that such persons were necessary parties to the suit; but they refused to inform the plaintiff of the names and addresses of such persons, and plaintiff was ignorant thereof.

That such persons were very numerous, and more than two hundred in number, and that their interests were identical with those of the defendants, other than R. L.; that they were sufficiently represented in this suit by said defendants.

The bill prayed that defendant, R. Leader, might be restrained from prosecuting the action at law against plaintiff and from commencing or prosecuting any other action or suit against the plaintiff in respect of his debt; and that defendants (except R. L.) [*nominatim*,] might be restrained from prosecuting the action in the name of R. L., or of

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wise, and from bringing any other action against plaintiff in the name of R. L., or in the name of any creditor of the Company, in respect of any debt due from the Company; and that the said defendants might further be restrained from distributing, paying away, or parting with the balance of the partnership assets of the Company, or any part thereof, in manner proposed by them as aforesaid, or in any manner except in payment of the liabilities of the Company, or in the carrying on and management of the partnership business of the Company, so long as any liabilities remained outstanding and unpaid; and that, for the purpose of ascertaining, if necessary, the present assets and liabilities of the Company, all proper accounts might be taken, directions given, and inquiries made, plaintiff thereby offering to pay any sum which might be properly due from him as a partner in the Company.

All the defendants, except R. Leader, demurred to the bill, for want of equity and for want of parties.

Mr. *Stuart* and Mr. *Daniel*, in support of the demurrer. —The whole case on the bill is, that the plaintiff is a partner with such of the defendants as are members of the committee of the projected Company; and being jointly liable with them, is entitled to have the debt for which he is sued paid out of the partnership assets. Now, in this case, there is no partnership; it is an association with a view to a partnership. The effect of the plaintiff's statement is, that the full number of shares not having been allotted or taken up, the whole scheme has proved abortive. The plaintiff, by his own shewing, has never done any act with reference to the management of the Company, which has been carried on exclusively, as he states, by the defendants; and he has not, therefore, in any manner rendered himself liable: *Fox v. Clifton* (a). Having, therefore, by his

(a) 6 Bing. 776.

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own shewing, a good defence to an action at law, he has no right to come for relief to a court of equity in that respect; nor has he a right to relief in this Court with respect to the disposition of the assets; for, not having contributed to them he has no interest as to the manner in which they are to be applied.

The VICE-CHANCELLOR, [without hearing Mr. Bethel, Mr. Follett, and Mr. Adams, who appeared in support of the bill.]—This appears to me to be a very plain case. It is represented on the bill that Leader was a creditor of the Company, and that the demurring defendants have procured an assignment of his debt, and are proceeding at law to enforce the payment of it against the plaintiff in equity. The plaintiff then files his bill, and sets forth that the defendants have in their hands sufficient assets of the Company to pay the debt. Now, it certainly is not according to the practice of this Court, that, because a plaintiff in equity might succeed in his defence to an action at law, he may not proceed to stop the action by coming to a court of equity. It comes to this—the plaintiff represents that the demurring defendants are making use of the action brought by Leader as a sort of screw, for the purpose of compelling him to pay £100 towards the expenses. I think the plaintiff is right in saying, that the defendants are compellable to use the funds in their possession to discharge the liabilities as they at present exist. Under these circumstances, I shall overrule the demurrer. As regards the injunction, I shall leave the defendants to settle the question if they please; but if they do not, I shall grant the injunction in the terms prayed by the bill.

Under my view of the effect of the statements in the bill the question of want of parties does not arise.

Note.—The Lord Chancellor of Ireland seems to have carried this point further than his Honor the Vice-Chancellor of England, in

of *Taylor v. Hughes*, 2 Lat. 24; for it appears the judgment in that case, although a partnership was undoubtedly established, frequently each member, by 6 Geo. 4, c. 42, being a creditor, a Court will interfere by injunction to restrain a creditor, under the direction of the Court of the company, from proceeding for the recovery of his judgment against the members of the minority of that company.

Marginal note of the case referred to, so far as it is relevant to the case reported as follows:—

Joint-stock Banking Company. Certain shareholders, who after obtained the management of the affairs of the company, agreed, in proportion to the number of shares held by them, to contribute to a fund which was to be used for the protection of contributors; an arrangement entered into between them and a creditor of the company, by which the creditor should obtain a judgment against the company, and against such of the contributors as the contributors selected. Accordingly a creditor obtained a judgment by proceeding against the public officer at the instance of the directors issued a scire facias against the plaintiff, who had been a shareholder, but before the judgment upon which the judgment had been obtained was entered, had, by informal

transfers, assigned his shares to a trustee for the company. This transaction is fraudulent in the view of a court of equity, and the creditor was restrained from proceeding at law against the plaintiff.

The Lord Chancellor of Ireland is therein reported to have said, [without reference to the other facts of this case], that it appeared that the company had given to the defendant a judgment by confession against their public officer, in order to enable him to go against a member for his demand under the 6 Geo. 4; and that this was an arrangement with him, that the Company should select the victims from the contumacious alleged shareholders, the defendant being indemnified against costs, and reserving his right to go against any other person in case he should be defeated. That this was a proceeding contrary to the spirit of the act which gave the right of selection to the creditor, and not to the majority of the partners, to enable them to throw the burthen on the minority: and alike contrary to the letter, for the 19th section of the act of 6 Geo. 4, expressly provided that any person against whom execution was issued should be reimbursed all loss and costs out of the fund of the co-partnership. And by the 31st article of the Deed of Settlement of 1834, it was in like manner provided, that when execution upon any such judgment was issued against any member, he should be reimbursed out of the funds of the company all his

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loss and expenses, and he was to have a right of action against any officer or other member of the company for what he should have paid. His Lordship then cited the case of *Const v. Harris* (a), wherein Lord Eldon laid it down, that, although the majority might bind the minority fairly in a partnership, yet that an agreement by a majority to overrule the minority without reference to merits would be rescinded by the Court: the parties must not abuse even a legal right.

That, in the case before him, the whole was a contrivance to enforce indirectly against the plaintiff the contribution which they did not venture directly to impose upon him, which was, in his Lordship's opinion, a fraud in equity which the defendant could not avail himself of, and therefore the injunction against him must be made perpetual. The defendant was the mere tool of the company, and he could not, in any view of the case, claim a higher right than they possessed.

(a) Turn. & Russ. 518.

June 3rd.

GOODMAN v. DE BEAUVOIR and Others.

On a bill filed, supported by affidavit, charging the managing committee of the

THE bill in this suit was filed by C. Goodman and others on behalf of themselves and all other the shareholders in the Warwick and Worcester Railway Company, except such Warwick and Worcester Railway Company with misconduct and mismanagement, the plaintiffs obtained an injunction ex parte to restrain some of the defendants and certain other persons, not defendants to the bill, from acting on an order for payment out of court to them of a sum deposited by them in the name of the said Company; but, on motion to dissolve that injunction, it appearing that a portion only of the sum deposited had been contributed by the Warwick and Worcester Company, and the remainder by two companies with which the Warwick and Worcester Company had amalgamated, but against which the bill sought no relief:—*Held*, that the injunction as to the portion of the fund contributed by the Warwick and Worcester Company should continue, but should be dissolved as to the portion contributed by the other two companies.

That, although the words of the 4th section of the 1 & 2 Vict. c. 117 (b), are imperative, yet the inherent authority in a court of equity to repress fraud and to exercise control over trustees, empowers it to look into the circumstances, and to decide whether the command of the legislature ought or ought not to be complied with.

(b) The portion of the section referred to is as follows:—"If in

any or either of the foregoing cases, the person or persons named

of the shareholders as were defendants, and such other of the shareholders as concurred with the defendants; and it stated, amongst other things, that the defendants, being at the time the managing directors of the London and Birmingham Extension Railway Company, had promoted and constituted themselves the managing committee of a proposed scheme, called the "Warwick and Worcester Railway Company;" and by the subscribers' agreement executed by the scrip-holders of the last-mentioned railway company, the same defendants had been appointed the managing committee of that Company, and had been invested with great powers, and, among others, with that of entering into any arrangement for purchasing, renting, or making use of any other railway or canal; and also with powers for amalgamating the said intended railway with any other, upon such terms as they should think proper. The bill, after alleging various acts of misconduct and mismanagement against the defendants, charged, (amongst other things), that they had already obtained an order from the Court for payment to them of the sum of £41,250, which had been deposited in the Bank of England in compliance with the Standing Orders, and that they intended to misapply the same; and the bill prayed that accounts might be taken of the affairs of the Company, and also that an injunction might be granted to restrain the defendants from acting on the order obtained for payment of

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such warrant or order, or the survivors or survivor of them, or the majority of such persons applying by petition to the Court, in the name of whose Accountant-General the sum of money mentioned in such warrant or order shall have been paid, the Court, in the name of whose Accountant-General such sum of money shall have been paid, shall, by

order, direct the sum of money paid in pursuance of such warrant or order, or the stocks, funds, or securities in or upon which the same are invested, and the interest or dividends thereof, to be transferred or paid to the party or parties so applying, or to any other person or persons whom they may appoint in that behalf," &c.

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the said sum of £41,250 to them, and from receiving or in any way possessing themselves thereof.

The plaintiffs, on the 26th May, moved *ex parte*, on affidavit, for an injunction in the terms of the prayer of their bill, which was accordingly granted.

The defendants now moved to dissolve that injunction; and, at the same time, the persons named in the speaker's warrant (some of whom were defendants and others not) presented a petition for payment of the sum deposited out of Court to them.

Mr. *Bethell* and Mr. *F. Jones*, for the plaintiffs.

Mr. *J. Parker*, Mr. *Rolt*, Mr. *Terrell*, and Mr. *H. Hughes*, for the other defendants.

Both parties insisted on the case made by their respective affidavits, which were of great length, and the substance whereof, so far as is material to be stated, is set forth in the judgment.

The VICE-CHANCELLOR.—Upon the paper, the case is extended to very great length, but the substance of it is this:—There was a project for forming a railway from Worcester to Warwick, and there was also one for forming a railway from Worcester through Warwick to Rugby, and another for forming a railway from Rugby through Warwick to Worcester; and it appears besides, that there was a projected company, called the “London and Birmingham Extension Company,” for making a railway from Northampton through Daventry and Leamington to Warwick. That being the state of things, it appears that the Warwick and Worcester Company amalgamated with the Worcester, Warwick, and Rugby, and that those two companies so amalgamated afterwards amalgamated with a third, the Rugby, Warwick, and Worcester; and thereupon a preparatory agreement by deed was entered into, which, as

and it, was matured by another agreement by deed into between the three last-mentioned companies London and Birmingham Extension Railway Com-

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ie last-mentioned deed, it was agreed that the three mentioned Companies should adopt the name of the "Warwick and Worcester Projected Company;" and it appears that this was with the approbation of the London and Birmingham Extension Company, (whose consent was necessary in respect of certain dealings in regard to canals, in which the question before me has nothing what-to-do). The result was, that, for the purpose of going to Parliament to procure an act which would authorise the amalgamation of the three first-mentioned companies, funds were constituted in this manner: £15,000 was taken out of the funds of the Warwick and Worcester, £10,000 out of the Rugby, Warwick, and Worcester, and £44,000 out of the Worcester, Warwick, and Rugby; which collectively made £69,000; and under the provisions of 1 & 2 Vict. c. 117, the gentlemen who were appointed to do so, paid in the sum of £41,250 out of the above sum of £69,000, which was raised in the way stated.

In respect to the case as it appears upon the affidavits in support of the bill, and the affidavits against it, I have to observe, that, with regard to the acts of misfeasance which are stated in the plaintiff's bill, and supported by the affidavits, it does not appear to me that there is any answer given; and the only attempt that has been made to show the effect of the proceedings had under the bill, is an attempt to make a representation by affidavit of the several matters with regard to the amalgamation of the com-

But first of all observe, that one thing, which was not said in argument, struck me as being of so great importance, that I really think I am bound to express a judi-

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cial opinion upon it. It is with reference to the 4th section of the 1 & 2 Vict. c. 117 (*a*). [His Honor having read the section proceeded as follows]:—Now, my opinion is, that though the words are imperative, and there is no qualification on the face of the section, though the word stands absolutely “shall,” nevertheless, by the inherent authority in this Court to repress fraud and to prevent false dealing, and to exercise a wholesome control over persons standing in the character of trustees, the section is not, in my opinion, imperative on the Court, in this sense, or to this extent, that the Court shall not look to the circumstances, and see whether it ought or ought not to do that which the legislature has *primâ facie* commanded to be done; and I am clearly of opinion that the Court has this authority (*b*).

As to the other part of the case, it appears to me, that the history of the amalgamation cannot, upon the affidavits, be taken to have been so much within the knowledge of the plaintiffs as that any objection can arise to their case, in respect of the fact that no mention is made of the amalgamation in the bill upon which the injunction was granted. I read it over most attentively, because I always mean to exercise the strictest jealousy on that particular point, viz., that it is the duty of those who come for the summary interference of this Court, fully to state the case within their knowledge, so that the Court may see that *primâ facie* the thing is fair in the aspect in which it is presented to the Court. Now, in my opinion, there certainly was some local rumour at Northampton, and some talk between parties about a projected amalgamation; but it would be absurd to say, that, therefore, any person must have had infused into his understanding anything like the contents of either of the deeds before mentioned, and in that respect my opinion is, that the plaintiffs’ case is not impugned.

(*a*) See the note, *antè*, p. 380.

(*b*) See next case.

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There is this further observation that I may make on this case, that, inasmuch as the £41,250 appears upon the affidavits to have been taken out of funds raised contributively by the three first-mentioned Companies, and an attack is made only upon the conduct of those who had the direction of the original Warwick and Worcester Company, I must sustain the case upon the affidavits at present, because the defendants have not thought proper to meet it; and I must continue the injunction with respect to the proportional part of the fund which may fairly be attributed to the original Warwick and Worcester Company; but with respect to those proportions of the fund which are fairly attributable to the other two companies, the Warwick, Worcester, and Rugby, and the Rugby, Worcester, and Warwick, there is no case made against them, and therefore as to them the injunction must fall. This, of course, will leave all the parties at liberty to prosecute such case as they may think they have in respect of the other Companies, in the same manner as if no bill had been filed. Now, I have taken the trouble to make the arithmetical calculation for the parties, that there may be no doubt on the matter, save and except only such doubt as may arise on my figures, which may be set right in a moment, and my opinion is, that (neglecting fractions less than a penny) there ought to remain in Court by virtue of the injunction that I pronounced *ex parte*, the sum of 8967*l.* 7*s.* 6*d.*; but that the injunction ought to be dissolved as to the sum of 32,282*l.* 12*s.* 6*d.*, because these are the successive proportional parts: one part being 52-3rds, and the other 18-23rds of the whole; and that is the order which I intend to make.

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BEFORE THE LORD CHANCELLOR.

June 11th.

CASTENDIECK v. DE BURGH.

An order was made by the V. C. of England on petition, for payment to certain persons of a sum of money, deposited on behalf of a projected railway company in compliance with the Standing Orders of the House of Commons, but on bill filed stating circumstances which would render it improper that such payment should be made, an injunction to restrain the parties from receiving the sum deposited was, notwithstanding the order, granted by *Knight Bruce*, V. C.

AN application was made to his Honor, *Knight V. C.*, on bill filed by three of the shareholders, on of themselves and all other shareholders, except the defendants, against the provisional committee of management of the Northern and Southern Connecting Railway Company for an injunction to restrain certain members of the provisional committee of that Company, from receiving of £15,525, which had been deposited by them in the House of Commons in compliance with the Standing Orders of the House of Commons. The bill charged the committee with mismanagement and misconduct, and prayed that certain accounts might be taken and inquiries directed with reference to the assets and liabilities of the Company, and the funds subscribed for the purposes of the undertaking.

The bill presented to Parliament having been rejected and the project abandoned, a petition was presented to his Honor, the Vice-Chancellor of England, and an order was made for payment to the petitioners, members of the provisional committee of management, of the sum deposited.

Mr. *Russell*, and Mr. *Daniel*, applied for the injunction.

His Honor, *Knight Bruce*, V. C., having expressed doubt whether he had jurisdiction to make an order which would in effect discharge the order made by the Vice-Chancellor of England, desired that the matter should be referred before the Lord Chancellor.

The application having been accordingly made to the Lord Chancellor, he said, that the order of the Vice-Chancellor was not binding on him.

cellor of England was merely made under the statutory power given to judges of the Court of Chancery; and that if, upon the merits of the case as stated on the bill, the Vice-Chancellor *Knight Bruce* thought proper to grant an injunction, his Lordship considered he had full power so to do.

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The *Vice-Chancellor Knight Bruce* afterwards granted the injunction.

BEFORE THE V. C. OF ENGLAND.

HARVEY v. COLLETT and Others.

July 8th &
9th.

THE bill, in this case, was filed by D. W. Harvey, on behalf of himself and all other the shareholders in, or subscribers to, the Royal North of Spain Railway Company, against W. R. Collett and twelve other defendants, the directors of the Company; and it stated (amongst other things) that, before the month of October, 1844, certain of the defendants projected a railway between two towns in Spain, and issued a prospectus, setting forth the names of the directors, the advantages of the scheme, and the conditions on which the public should become subscribers, one of which was as follows: "The constitution of the Company is that of an anonymous Company (*compania anonima*), in accordance with the 270th article of the Commercial

A purchaser of scrip in a projected Spanish Railway Company filed his bill against the provisional committee of that Company, praying that an agreement with a promoter of the railway, whereby he was to receive a large sum out of the subscribed funds of the Company, might be declared void; and also praying a general account of the affairs of the Company.

The bill having made a case against the directors, from which it would appear that the scheme was a fraud upon the plaintiff, and that the Company was in fact a bubble company, a demurrer to the bill for want of equity was allowed, on the ground that the plaintiff having made out a case of fraud against the defendants, he was not entitled to the detailed relief sought by his bill.

It seems, that where a bill contains averments as to the effect of certain articles of a foreign law, but is silent as to others, the Court will presume that the foreign law only differs from the English in the particulars stated.

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Code of Spain. By the 278th article, the liability of shareholders is limited to the amount of their respective shares." That one of the defendants, R. Keily, as a member of the board of directors, in October, 1844, proceeded to Spain for the purpose of proposing to the Government of that country, certain measures relative to the projected railway; and certain decrees, grants, concessions, or royal orders, were on that occasion made to him on behalf of the Royal North of Spain Railway Company. That the said defendant, Keily, returned to England in the first week of March, 1845, when it was fraudulently agreed and arranged between him and the other defendants, that he R. Keily, should be taken by the other defendants to have obtained such several decrees, grants, concessions, or royal orders, in his own behalf and for his own benefit; and that £40,000 should be paid to him on behalf of the said Royal North of Spain Railway Company; and that he should agree to sell and assign to the Company all the said decrees, grants, concessions, or royal orders.

That an agreement was accordingly made on the 14th March, 1845, between the said R. Keily and the other directors, for payment of £40,000 to the said R. Keily £20,000 payable on the commencement of the first section of the railway, being from Aviles to Leon, and the remaining £20,000 on the commencement of the line from Leon to Madrid.

That, on the 14th March, 1845, the defendants caused a prospectus to be printed and circulated, containing an account of the objects and advantages of the Company in which it was stated that the line from Aviles to Mieres (thirty-five and a half miles in length), had been surveyed and reported upon by competent English engineers, and presented no engineering difficulties. That more than one-third of the shares had already been subscribed in Spain; a proof, independently of the powerful patronage which the project had already obtained, of the high estimation

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tion in which it was held in that country. That the affairs of the Company would be conducted by directors in London, assisted by an influential direction in Spain, and the remuneration to the directors and fondateurs would be made in accordance with the plan usually adopted in continental railways. To this prospectus was added the usual form of application for shares.

That the plaintiff applied to the directors for an allotment of shares, in the form prescribed by the prospectus of the 14th March, 1845, but no shares had been allotted to him; and that the price of shares, (upon which a deposit of £2 per share had been paid), advanced to £5 and upwards per share.

That the directors of the Company, anticipating that the shares would sell at a considerable premium, allotted to each of their own body a very large number, the greater part of which they sold immediately the price of the shares had risen to a considerable premium; and thereby, and otherwise, by means of their situation as directors of the Company, the defendants had made very large profits upon the shares reserved by and allotted to themselves.

That the shares of the capital of the Company were represented by certificates issued by the defendants as such directors; and when signed by two of the directors of the Company on behalf of the Company, such certificates, and the shares therein respectively mentioned, were transferable by delivery.

That the plaintiff, having been influenced by the statements and representations of the prospectus of 14th March, 1845, purchased 100 shares in the Company, at the price of 27. 15s. per share, and received transferable certificates, under which he was then entitled to 100 shares in the capital of the said Company.

That, by an indenture, dated 20th June, 1845, in consideration of £10,000 paid by 5000 shares in the Company, upon which a deposit of £2 per share was considered as paid,

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and of £10,000 paid in cash, the said R. Keily, with a view of facilitating the completion of the undertaking, relinquished his claim to the further sum of £20,000 agreed to be paid to him.

That, although the defendants, some time before the 20th June, 1845, had been fully informed, that, from the nature of the country between Aviles and Leon, and by reason of the engineering difficulties which existed, it was impossible to form the said intended railway, yet they concealed the true and real state of the Company from the shareholders until the 13th October, 1845, when they convened a meeting of the shareholders.

That, at such meeting, a report was made, to the effect, that, with respect to the first section of the railway from Aviles to Leon, the directors had taken prompt and efficient measures to ascertain the practicability of fulfilling the conditions of the concession made to the Company; that they had sent out to the Asturias a numerous staff of engineers, who had at great cost examined the entire mountain-ranges of the first portion of the line; and that, from the sections of the proposed railway, and the report of their engineers, it would be seen that the difficulties in the Asturias were of so insurmountable a character as to deter the directors from proceeding with that portion of the concession; and the directors then made certain propositions to the shareholders.

That a printed document was produced and presented to the meeting, intituled "Report of the Engineers to the Directors of the Royal North of Spain Railway Company," and purporting to be the report of Messrs. R. and B., dated 8th September, 1845, and also the report of G. Stephenson bearing no date; from which report it appeared, as the fact was, that the said railway was altogether impracticable, and that the statements and representations as to the nature of the country, the amount of traffic, and the absence of engineering difficulties, and the other circumstances favourable

the said project, contained in the said prospectus of 14th March, 1845, were altogether, for the most part, untrue.

That divers large sums of money in respect of deposits paid by shareholders and subscribers upon their shares in the Company, and by various other means, had been received by and were then in the hands of the defendants.

The bill then charged, that the allotment and delivery of the said R. Keily of 5000 shares, and the payment to him of £1000 in cash, were breaches of trust towards the shareholders.

That, on the 14th March, 1845, all the defendants well knew that the engineering difficulties of the Asturias were insurmountable, and such as rendered the formation of a line of railway proposed by the prospectus totally impracticable; and that the same was totally impracticable. That the local traffic alone of the intended railway would not yield an ample or any profitable return to the capital invested in the said undertaking. That the statements and representations made by the defendants (the directors) in the prospectus of the 14th March, 1845, of the advantages to be expected from the proposed Railway, had been put forth by them without their having made proper, or any, inquiries into the truth and accuracy of such statements and representations; and that the statements in the prospectus were for the most part untrue. That all the shareholders of the Company had a common interest in having the property, monies, and effects of the said partnership duly got in and properly applied to the purposes of the said partnership, and in the relief thereby prayed.

The bill prayed, that the agreement with R. Keily, of 14th March, 1845, might be declared to be fraudulent and void,

that the defendants, (except R. Keily), and each of them, might be decreed to be personally liable to pay and restore good, as part of the property, monies, and effects of the Company, the said sum of £10,000, paid to the said R. Keily, and such a sum as the amount for which the said 5000 shares in the said Company, so as aforesaid allotted and

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delivered by the said defendants to the said R. Keily, and have been sold at any time between the 14th March, 1845, and the 13th December, 1845, with interest. And the plaintiff further prayed accounts of the monies and shares received by the defendants, and prayed, in effect, a general account of the affairs of the Company.

To this bill the defendants demurred generally for want of equity, and because all and every the other holders of shares were necessary parties, and because the plaintiff or holder or holders of the shares purchased by the plaintiff was or were a necessary party or necessary parties.

Mr. *Walker* and Mr. *Heathfield*, in support of the demurrer.—The allegations contained in the bill are all to the effect that this Company was, in fact, a bubble company and wholly illegal; if so, the plaintiff has his remedy at common law, but cannot come to a court of equity for relief. *Duvergier v. Fellows* (a), *Blundell v. Winsor* (b), *Harvey v. Heathorn* (c), *Ewing v. Osbaldiston* (d), *Mitford's Case* (4th Edit.), *Rex v. Dodd* (e), *Josephs v. Pebrer* (f), *Harvey v. Bignold* (g), *Kinder v. Taylor* (h). Although the Bubble Act (6 Geo. 1, c. 18,) is repealed, the common law remains in force wherever a fraud has been practised. All the cases decided on the Bubble Act, shew that the act did not in effect annul the common law, but was declaratory of it, and rendered it more stringent. As it is stated in the pleadings, the plaintiff cannot set up that this is a Spanish Company, and on that account their transactions do not come within the jurisdiction of the English courts. *Cathcart v. Lewis* (i). It is doubtful whether the plaintiff, being a holder of scrip, can sue at all in a court of equity. *Jackson v. Cocker* (k); at all events, he cannot sue against half of the original shareholders in the Company,

(a) 5 Bing. 248.

(b) 8 Sim. 601.

(c) 6 M. & G. 81.

(d) 2 My. & Cr. 53.

(e) 9 East, 516, 527.

(f) 3 B. & C. 639.

(g) 2 Jac. & W. 503.

(h) Coll. on Pp., App.,

(i) 1 Ves. jun. 463.

(k) 4 Beav. 59.

behalf of those who have distinct and separate interests:

Jones v. Garcia del Rio (a), *Walburn v. Ingilby* (b).

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Mr. *Bethell* and Mr. *Welford*, in support of the bill.—The legality or illegality of this Company is not to be decided by the English law. The whole scheme, as shewn by the prospectus, is for establishing a Company in Spain, and in conformity with the laws of that country; but even if this be a bubble company, and it be shewn, as stated by this bill, that some of the parties have made profits, the plaintiff is entitled to an account of those profits, and to have those profits placed to the general credit of the Company; but it is sufficiently stated on the bill that this is not a bubble company, inasmuch as it appears that the Spanish Government have granted certain immunities and privileges to the Company, and that shares have been allotted and deposits paid. Engineering difficulties have caused the abandonment of the line, but the existence of those difficulties is not stated to have been known until long after the Company had been formed. The Company, being originally a legal company, could not be rendered illegal by the subsequent proceedings of the directors.

Mr. *Walker* replied.

VICE-CHANCELLOR.—It seems to me that the case is reduced to this very short point, whether the thing proposed by the directors was not, on the 14th March, 1845, within their knowledge, a matter wholly impracticable; and that time is material, because the plaintiff states in his bill, that he, having been influenced by the statements and representations of the prospectus of the 14th March, 1845, purchased 100 shares, so that such right as he might have had to interfere in the affairs of the Company came to him after the 14th March, 1845. The charge in the bill is, that, on

(a) *Turn. & Russ.* 297.

(b) 1 *My. & K.* 61.

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the 14th March, 1845, all the directors well knew that the engineering difficulties of the Asturias were insurmountable, and such as to render the formation of the line of railway proposed by the prospectus totally impracticable. The plaintiff charges that it was totally impracticable: and there is a similar charge with respect to the fact of impracticability in a preceding part of the bill; where it states, "that, from the said report, it appears, as the fact is, that the said intended railway is altogether impracticable." And then the bill charges, that the statements, representations, and so on, are for the most part untrue; so that there is a most positive allegation that the thing is not only impracticable, but was known by the directors to be so, before the plaintiff became a purchaser of shares. Now, I admit that there is a great deal of allegation incidentally as to the law of Spain, there is, for instance, a statement, that, by a particular article in the Spanish code of laws, shares of this nature may become transferable; and also by another article of Spanish law, that, in the view of that law, a limited responsibility only is sustained by shareholders in what is called an anonymous Company, such as this is said to be.

I do not, however, find any allegation which expressly avers what the law of Spain is, and, though it appears that there have been grants and concessions made by the royal authority of the Government of Spain, and the Queen of Spain has condescended to be the patron of this undertaking, and a great number of Dukes and Counts have become the patrons of it, yet I do not find there is any allegation that the projection of a scheme known to be impracticable is a scheme that would be considered by the law of Spain other than such as it would be considered by the law of England. It appears to me, that, upon the allegations in this bill, I must take it that at the time when the directors issued the prospectus of the 14th March, 1845, confiding in which the plaintiff purchased his shares, they knew that the thing was totally impracticable;—that is the averment upon the bill.

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Then, if the plaintiff so states the case, he really states that these defendants were projecting a manifest fraud,—a mere bubble,—a mere scheme to cheat; and if he state his case in that way, I do not think I am at liberty to give him the detailed relief which he asks by the bill. The plaintiff, having aimed substantially at the relief which he asks, I am not now at liberty to say that the general relief prayed is to go for nothing, and that this bill is to be considered merely as a bill for the purpose of recovering from the defendants the amount of what he may have paid, or the original value of the shares. It seems to me that this demurrer must hold, on the general ground which I have stated, and it is, therefore, unnecessary to enter into the various other questions that have been mooted at the bar. If, indeed, the thing had not appeared on the face of it to have been a fraud, in the knowledge of the directors at the time when they issued the prospectuses, which was before the plaintiff's purchase, why then I think that the principle of the case of *Hichens v. Congreve* (a) would have applied. It appears to me, upon the consideration of the case, that, for the purpose of overwhelming the directors with charges of fraud, the plaintiff has gone rather too far to enable me to give him any relief at all. And it also appears to me an extraordinary thing, that any man, especially a person so well known in this country as this gentleman is, should ever have purchased any shares in such a scheme as this; I am not at liberty to conjecture what the motive was for purchasing the shares, but I must take it he was influenced by the prospectus of the 14th March, and, therefore, he purchased from those who issued that which they knew to be totally false. Therefore, I think, upon this bill, as it is constituted, I cannot give any relief, and, consequently, the demurrer must be allowed.

(a) 4 Russ. 562.

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July 4th.

GILBERT v. COOPER and Others.

The provisional committee of management of a projected railway (the South and Midland) were by the subscription contract invested with full power and authority to fix upon, and from time to time to alter and vary, the points or places at which the intended railway should commence and terminate, and the intermediate course, route, or line thereof; and it was amongst other things agreed, that they should have ample

THE bill was filed by H. Gilbert, on behalf and all other the shareholders in a projected Company "The South and Midland Junction Railway," except such of the shareholders as were defendants against the directors of that Company and two of the Manchester and Poole Company; and in 1845, a project was formed for making a railway from London to Salisbury, and that the promoters issued a prospectus setting forth the objects and advantages of the project, mentioning the different towns through which it was to pass; amongst others the town of Devizes, in which the plaintiff resided; and that he, and many others in the vicinity, on the faith of the prospectus, applied to the directors. That eighty shares were allotted to the plaintiff, of which he paid the deposit, and executed a preliminary contract, dated 24th September, 1845.

By this contract the subscribers covenanted

power to carry all or any part or parts of the undertaking as described in the contract into effect, and to make contracts with railway or canal proprietors, to adopt all such measures whatsoever as any board or meeting or committee might in their judgment think necessary or expedient, or might be advised to do, and particularly to apply for an act &c.

The committee having, by default of their engineer, failed to comply with the resolution of the House of Commons, entered into an arrangement to amalgamate with the Manchester and Poole Company (the Manchester and Poole) who had complied therewith, and to pay a parliamentary deposit for them, and also to pay them £8000 on account of the deposit, which payment was to form an item to the credit of the South and Midland Company.

The sum of £55,000 was accordingly deposited in court, to the credit of the Manchester and Poole Railway Company, in the names of three of the directors of the first mentioned Railway Company.

Some of the shareholders in the South and Midland Railway Company, dissatisfied against this arrangement, filed their bill for an account of the deposits, &c., and for an injunction to restrain three of the persons in whose names the parliamentary deposit was made, from prosecuting an order which they had obtained on petition, for payment to them of the sum deposited:—*Held*, on motion for an injunction in the terms of the bill, that the committee of the South and Midland Company had no right in the individuality of their Company, or the original character, rights, and powers of the Manchester and Poole Company, and that they were not justified in paying the money of their cestui que trusts out of the deposit, and so as to form an item of account between themselves and another Company.

Injunction accordingly granted.

pectively subscribed the several amounts set opposite to
 air names, for the purpose of making a railway, to be called
 The South and Midland Junction and Bicester, Swindon,
 Marlborough, Devizes, and Salisbury Railway, with branches
 Poole and Southampton," or by such other name or names
 might, at any time or times, be adopted by the provisional
 committee or directors for the time being of the said under-
 taking, &c., by such course, route, or line, and through such
 parishes, townships, and places, as should be from time to
 time settled and approved of by the provisional committee
 or directors for the time being, and with such branch or
 branches, or extension or extensions, from the intended
 railway to Poole and Southampton, and any other towns or
 places whatsoever, or to any railways, canals, or works, by
 such course, route, or line, and through such townships,
 parishes, and places, and also with such roads, stations, &c.,
 should from time to time be settled and approved of by the
 provisional committee or directors for the time being, the
 same to be made in such manner as should be provided by an
 act or acts of Parliament to be applied for in the then next
 session, or in some subsequent session or sessions of Par-
 liament. And it was provided, that the provisional com-
 mittee of directors for the time being of the undertaking
 should have full power and authority to fix upon, and from
 time to time to alter and vary, the points or places at which
 the said intended railway, or any part thereof, should com-
 mence and terminate, and the intermediate course, route, or
 line thereof; and also from time to time to determine what
 branch or branches, extension or extensions, should be made
 therefrom, and what roads, stations, &c., should be made,
 and to fix upon, and from time to time to alter and vary,
 the points or places at which any such branch or branches,
 extension or extensions, or any part or parts thereof re-
 spectively, should commence and terminate, and the inter-
 mediate course, route, or line, or respective courses or lines
 thereof, and also the extent and extension of such road,
 stations, &c.; and also to make and (if necessary) renew,

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or cause to be made and renewed respectively, such applications to Parliament for all or any of the purposes aforesaid, and to conduct such applications, and all or any proceedings which they should deem requisite or expedient for obtaining any such act or acts as aforesaid, in such manner as they in their discretion should think proper, with full power, at their discretion, to confine the application or applications to Parliament, in the next or any future session or sessions, to any portion or portions of the said intended main railway, and either to admit, or not to admit, all or any of such branches and extensions as aforesaid, and to defer the application for the remainder of such main railway, or any part or parts thereof, and for all or any of such branches or extensions, to any future session or sessions; and lastly, that, in the event of no such act or acts being passed into a law, the said parties thereto of the first part respectively, and their respective heirs, executors, administrators, or assigns, should pay, allow, and discharge all the expenses which should have been incurred, whether previously to or after the execution of the contract, in or about, or with the view to the establishment or promotion of, the said undertaking, whether in or about the making, obtaining, or completing of any surveys or estimates for the said contemplated works, or any of them, or on account of any solicitor's charges, counsel's fees, travelling expenses, or the costs of preparing, applying for, soliciting, or promoting any such act or acts as aforesaid, or on any other account whatsoever incidental or preparatory to the said proposed undertaking, or to the promotion or establishment thereof, all such expenses to be computed and assessed rateably upon the amount or sum or sums of money respectively subscribed by each and every of the said several parties thereto.

That by the subscription contract, of the same date, it was amongst other things agreed:—

“1. That the said provisional committee of management or directors, or any board or meeting thereof, constituted

ording to the provisions herein contained, shall have
ple power to carry all or any part or parts of the under-
ing, as described in the said parliamentary contract, into
ect, and for that purpose to cause such surveys and esti-
ates, and also to make such contracts and arrangements
ith railway and canal proprietors, land-owners, and other
ersons, and generally to adopt all such measures what-
ever, as any such board or meeting of the provisional
ommittee or directors as aforesaid, or any committee or
ommittees of management, to be constituted or appointed
n manner hereinafter mentioned, may, in their judgment,
hink necessary or expedient, or may be advised to adopt,
nd particularly to apply for and seek to obtain, as early as
may be, an act or acts of Parliament for the establishment
nd promotion of the said undertaking, with such arrange-
ments and provisions as they may think expedient.

"2. The majority of members at any board or meeting
to bind the rest.

"3. The provisional committee to have power to add to
their number, &c.

"4. The provisional committee to have power to appoint,
suspend, or remove bankers, solicitors, engineers, &c., and
to pay salaries, &c.

"5. That the said provisional committee of management
or directors shall have full power to apply all or any part
of the monies which shall have been paid by way of deposit,
as hereinafter mentioned, in payment of all or any such
salaries or recompenses as aforesaid, and in making such
deposits as may be necessary for the purpose of complying
with the standing orders of Parliament, in such manner as
they may think proper, and in payment of the costs and
expenses incurred, or to be incurred, in or about the ob-
taining of any such surveys or estimates as aforesaid, in or
about, or with reference to the applying for and obtaining,
or endeavouring to obtain, an act or acts of Parliament as
aforesaid, and all other costs, charges, and expenses incident

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to the said undertaking, or which have been or may be incurred in respect or on account thereof or relating thereto, and generally in such manner as the said provisional committee or directors shall think most conducive to the advantageous establishment, and promotion and advancement, of the said undertaking, and in remunerating themselves respectively for their time and trouble.

“ 6 That the said provisional committee of management or directors shall have full power to make all such contracts and arrangements with railway and canal proprietors, landowners, and other persons, as they shall think proper, concerning or relating to the said undertaking.

“ 7. That the provisional committee of management or directors shall have full power, from time to time, to make and establish all such bye-laws as they may think necessary or expedient.”

The bill then stated, that, before the 30th November, 1845, it became known to the directors that it would be impossible to deposit plans on that day, and that, consequently, they could not apply for their act of incorporation during the then ensuing session. That up to that time the expenses incurred were very inconsiderable, and there was then in the hands of the directors upwards of £90,000 derived from paid up deposits. That the directors did not take any steps to obtain a knowledge of the depositor's wishes with respect to the disposition of the said deposits. That no communication was made to plaintiff until the 21st January, 1846, when he received a letter signed by the secretary of the Company, announcing the amalgamation of the Company with the Manchester and Southampton Railway Company, and containing the following passage:—
“ The directors may add, that, as early as is compatible with the interest of the body of proprietors, the precise arrangement will be submitted to them, and such shareholders (if any) as then dissent will have the opportunity of

receiving back their deposits, less the expenses. Henceforth the affairs of the South and Midland Company will be managed by a joint committee, who will take into their consideration at the earliest moment the possibility of promoting the line of the Company between Bicester and Windon."

That the Manchester and Southampton Railway Company was intended to pass through a wholly different line of country, and was in no respects similar in its extent, course, or objects to the first projected line, and that plaintiff would not, and he believed that the great bulk of the shareholders in first projected Company would not, have consented to such an amalgamation.

That, on the 19th May, 1846, plaintiff received another letter, signed by the secretary of the South and Midland Company, announcing that a meeting was intended to be held on the 23rd May, to take into consideration the propriety of obtaining a bill for making a railway from Poole to join the Manchester and Southampton Railway, and asking plaintiff for his assent to that bill, entering also fully into the reasons for the aforesaid amalgamation, and stating, that, by the Manchester and Southampton line, two-thirds of the original scheme would be carried out.

That the Manchester and Poole Company was a separate company from the Manchester and Southampton Company; and that the Manchester and Poole Company did not in any way correspond with the South and Midland Junction Railway.

That plaintiff attended the meeting, at which defendant Cooper presided, and it was then announced by him, and admitted by the other directors, that they had entered into an arrangement with the Manchester and Southampton Railway Company, to the following effect, namely, that the shareholders in the South and Midland Junction Company, including plaintiff, should be made shareholders to a large extent in the Manchester and Poole Company, which last-mentioned Company should, if suc-

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cessful, merge in the Manchester and Southampton Company; in which case the shareholders in the South and Midland Junction Railway Company would become shareholders in the Company to arise from the union of the Manchester and Poole and Manchester and Southampton Company, to the extent of £300,000.

That it was also stated at such meeting, and admitted by the directors, that, with a view to the benefit of the Manchester and Southampton and Manchester and Poole Companies, especially the latter, and in order to enable the latter Company to apply to Parliament for an act of incorporation, they had subscribed and paid out of the monies of the South and Midland Junction Company the whole Parliamentary deposit on behalf of the Manchester and Poole Company, to the amount of £55,000, without any authority from the depositors.

That the plaintiff and the great majority of shareholders present protested against such proceedings, and declined to have any connexion with the proposed Manchester and Poole Company; and, upon plaintiff threatening to institute proceedings in Chancery, the directors of the South and Midland Railway Company undertook to procure the withdrawal of the bill for incorporating the Manchester and Poole Company, which they accordingly did.

That the sum of £55,000, which had been paid in to the credit of the Manchester and Poole Railway Company, was still in the Bank of England, in the names of the defendants Cooper, Fisher, Shaw, Walkinshaw, and Tootal, the two latter of whom were directors of the Manchester and Poole line, but were not directors of the proposed South and Midland Company.

The bill then stated, that plaintiff had recently discovered that the directors of the South and Midland Junction Company threatened, and intended out of the monies in their hands, together with the said sum of 55,000, when the same should be paid to them out of Court, to pay and discharge all the costs, charges, and expenses incurred in and about

the Manchester and Poole Company, from the original projection thereof to the withdrawal of the said bill, amounting to many thousand pounds, and that they had, in fact, entered into some contract with the Manchester and Southampton directors, or with the Manchester and Poole directors, or both of them, to do so.

That, on the 13th June, 1846, the defendants Cooper, Walkinshaw, and Tootal, presented a petition to the Court, praying for payment out to them of the said sum of £55,000; and the order was made accordingly on the 17th of that month.

The bill prayed, that an account might be taken of all the deposits received by the defendants for the benefit of the South and Midland Junction Company, and of their application thereof; and that it might be declared what part (if any) of the payments made by the defendants were properly made as between plaintiffs and defendants; and that they should be disallowed all payments improperly made by them, and should be declared personally liable to repay such sums, &c.; and that it might be declared that the defendants, the directors of the South and Midland Junction Railway Company, had, by the various proceedings in the bill stated, been guilty of a gross breach of the trust reposed in them by the shareholders in the same Company; that they might be removed, and fit persons appointed in their place to wind up the concerns and distribute the assets; that the defendants might be restrained from receiving or possessing themselves of the said £55,000 so deposited as aforesaid; and, in particular, that the defendants who obtained the order of the 17th June might be restrained from prosecuting that order, and that all the defendants might be restrained from intermeddling or dealing with the property or assets of the Company, or any part thereof; that an account might be taken of all the assets and liabilities of the Company (if any), and payment made thereof, and that the residue might be distributed among the shareholders; and that the defendants might be decreed personally to pay all the costs of the bill.

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The plaintiff now moved for an injunction to restrain Walkinshaw, Cooper, and Tootal, from prosecuting the order obtained by them on the 17th June, for payment out of court of the sum of £55,000; and also to restrain the three last-named defendants, and the defendants S. N. Fildes and W. Shaw, from obtaining, or endeavouring to obtain any order, either alone or in conjunction with any other person or persons, or in any manner taking any proceedings to obtain payment to them, or any of them, of the said sum of £55,000, or such other sum as had been deposited, as the pleadings mentioned.

The motion was made upon the affidavit of plaintiff which was an echo of the statements in the bill. Against the motion was read the joint affidavit of G. N. Wright, the secretary to the South and Midland Junction Railway Company, and W. B. James, the solicitor to the Company, which stated, among other things, that the Manchester and Southampton Company were about to apply to Parliament for an act to enable them to construct a line from Swindon in Gloucestershire, to Swindon, in the county of Wilts, Marlborough, to Southampton, with a branch from Ludgershall to Poole, in Dorsetshire; and that such line constituted by far the greater portion of the scheme originally proposed by the South and Midland Company. That the said Manchester and Southampton Company, shortly before the transactions with the South and Midland Company, altered their scheme, and determined to apply for two separate acts of Parliament, the one for the line from Swindon, in Gloucestershire, to Southampton, and the other for a branch from Ludgershall to Poole. That it became necessary to have a fresh parliamentary contract for the proposed branch from Ludgershall to Poole; and that it was agreed between the directors of the Manchester and Southampton Company and the directors of the South and Midland Company, that the shareholders of the latter Company should be entitled to 1500 shares in the Ludgershall and Poole Company; and that the sum of £55,000

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then in the hands of the directors of the South and Midland Company should be paid into court as an advance, and to enable the Ludgershall and Poole Company to comply with the standing orders with regard to deposits; and that, upon the faith of such guarantie, it was also agreed that the sum of £8000 should be advanced to the Manchester and Southampton Company on account of the expenses incurred in promoting and preparing the Ludgershall and Poole line, which sum was to form an item to the credit of the South and Midland Company. That, at the meeting of shareholders, held on the 23rd May then last, the Ludgershall and Poole line was disapproved of by the shareholders in the South and Midland Company; and it was accordingly agreed by the directors of the South and Midland Company and the directors of the Manchester and Southampton Company, that the said agreement should be put an end to, and the £55,000 paid out of court for the purposes of the South and Midland Company. That the petition referred to in plaintiff's bill was presented for the purpose of effecting such return. That the advance of £8000 was claimed by the directors of the South and Midland Company, and the right thereto was the subject of a reference to counsel between the two Companies. That it was not intended, and since the withdrawal of the Manchester and Poole line it had never been intended, out of the sum of £55,000, or out of any other sum then in the hands of the directors of the South Midland Company, to apply any part thereof in payment of the expenses of the Manchester and Poole Company. That the line proposed by the Manchester and Poole Company, taken in conjunction with the Manchester and Southampton Company, corresponded with by far the greater portion of the projected South and Midland Railway; and that, except so far as the last-mentioned scheme extended from Swindon, in Wilts, to Bicester, the whole object of such scheme would have been substantially answered by the Manchester and Poole Rail-

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way, in conjunction with the Manchester and Southampton Railway; and that it was distinctly agreed between the two Companies at the time of entering into the agreement, that the remainder of the South and Midland scheme from Swindon to Bicester should, at a future period, be made the subject of consideration.

Mr. *Bethell* and Mr. *Wickens*, in support of the motion, relied on the facts stated in the bill, and supported by affidavit.

Mr. *Stuart* and Mr. *Terrell*, contra.—The objects of the intended Company are in everything but the name carried out by the proposed amalgamation with the Manchester and Poole Company. They had ample powers given them, under the terms of their subscription contract, to make such a railway as will be constructed by the Company with whom the directors have, in their judgment, thought it advisable to come to terms of arrangement. The directors were prevented by the default of their engineer, but not through their own neglect, from applying to Parliament for an act; and they did the best thing they could devise to remedy the delay to which they would otherwise have been subjected. They did not give up the interests of the shareholders to another Company, but made it a term of the arrangement, that some of the South and Midland Junction Directors should be also directors of the line which they proposed to join. The plaintiff's case is, that the money of his Company ought never to have been in court; and yet he is guilty of this inconsistency, that when the directors seek to get it out for the purpose of distributing it among the shareholders of the South and Midland Company, he files a bill to prevent them from so doing. If the money had remained in the hands of the directors, the Court would not, in such a case as is stated in the bill, have ordered them to pay it into court; will it then prevent the money from reverting into those hands

from which it would never have compelled the removal? Except in the case of executors, this Court will not interfere with money in the hands of persons legally appointed to receive it, unless it is clearly shewn that they have committed a breach of trust, or transgressed the powers with which they had been invested. The defendants contend, that they had ample authority to do what they have done; and until that very nice question, whether or not they have exceeded their powers, be decided, this Court can have no right to interfere with their possession of the monies entrusted to them. Again, the plaintiff has lost all right to interfere by acquiescence; for, although he was well aware of the arrangement in January, he did not signify his dissent until May.

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The VICE-CHANCELLOR, without hearing the reply.—The question in this case really is, whether, substantially, what the managers of the South and Midland Company did was authorised by the subscription contract. I do not go through every word of it, because it has been so often discussed; but it is perfectly true, that these gentlemen, who were so named to manage, were authorised in general terms to carry all or any part or parts of the undertaking, as described in the parliamentary contract, into effect, and for that purpose to cause surveys and so on, (preliminary matters), to be made, “and generally to adopt all such measures whatsoever as any such board or meeting of the said provisional committee or directors as aforesaid, or any committee or committees of management to be constituted or appointed in a manner hereinafter mentioned, may, in their judgment, think necessary or expedient, or may be advised to adopt, and, particularly, to apply for, and seek to obtain, as early as may be, an act or acts of Parliament for the establishment and promotion of the same undertaking.” Then, the second proviso directed that the majority of members at any board or meeting should bind the rest; and then it was

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directed that the provisional committee should have power from time to time to add to their number from the subscribers, and so on; and then there is a general power given to them to suspend and remove officers; and then, by the 6th clause, it was provided "that the provisional committee shall have full power to make all such contracts and arrangements with railway and canal proprietors, landowners, and other persons, as they shall think proper, concerning or relating to the said undertaking;" then, that they shall have power to make bye-laws, (that is the 7th clause), and that they shall have power to invest such deposits as they may think fit in government or real securities. Now, it appears to me to be perfectly plain, on this subscribers' contract, that it never was the intention of the parties who gave authority to this provisional committee, that they should have power to take any such steps, as that, when taken, the original projectors themselves of the South and Midland Company should no longer have in their own hands the dominion over the plan. In other words, it does appear to me that there was no authority given here to these directors to surrender their powers to any persons, to take away the individuality of the character which the South and Midland scheme originally had, and to make them, as they might have been made in the progress of amalgamation, sanctioned by act of Parliament, altogether a distinct thing from what they originally contracted to be. They were to be a set of persons supplying themselves the capital necessary for the carrying into execution the proposed purpose; they were to have the dominion over their own funds, &c.; and it appears to me, that, unless some express words can be found of larger import than any that I can see in this subscribers' agreement, the gentlemen who were intrusted with the provisional management had no power to do what they projected to do.

It is perfectly true, that, when an application is made to

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this Court for its interference in the transit of large sums of money in which several persons are interested, a great deal of inconvenience may be produced by the interference of the Court; and I admit that there is great weight in Mr. Terrell's observations on that part of the case: but then it is to be considered, on the other hand, whether, if gentlemen contract to form themselves into a society, to be governed by themselves, they are to be transferred, by a sort of oriental despotism exercised by the provisional directors, into a company,—a set of beings, I should rather say, of a totally different character. They contracted to be individuals spontaneously formed to govern themselves and their own affairs. The scheme which was aimed at by the directors was, I dare say, very laudable; (I am not speaking in any terms that can give the slightest offence to any human being); but, mistaking their powers, meaning to act for the best, but in my opinion judging erroneously, they proceeded to destroy the original character, rights, and powers of the original projectors of the South and Midland Company; which, in my opinion, is what this Court ought not to allow.

I do not conceive that the party has applied too late. As long as the £55,000 remains in court, it is safe; but when an application is made to have it paid out of court, then is the time to apply, and then the bill is filed. It appears, that, in pursuance of the circular of the 19th May, the meeting was held on the 23rd, and there was ample protest, and a declaration that this gentleman, who is a plaintiff now, would file a bill. [His Honor asked on what day the money was actually paid in, and on what day the application was made for payment of it out of court. It appeared, that the money was paid in in February, and the application to have it paid out of court was made on the 17th of June following.] I cannot but think, that, this meeting having taken place on the 23rd May, and the bill having been withdrawn, as it is sworn, on the 25th May,

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this bill was filed quite in time for the purpose of intercepting the transit of the money back again, apparently on the face of the order, into the hands of the gentlemen, who were never authorised by the projectors of the South and Midland Company to receive any part of their assets whatsoever. I dare say it is all perfectly right, and it was understood in the way of honourable proceedings, that Messrs. Walkinshaw and Tootal, who were not directors of the South and Midland Company, would put the money into the possession of Mr. Cooper and those two other gentlemen who were the three provisional directors of that Company, and who joined with them in paying in the money. I observe, by the terms of the act of Parliament, that the money can only be had out in a given form,—that the parties who paid it in, or a majority of them, may apply to have it out; and the direction is, that it shall be paid to the parties applying, or to those whom they may appoint.

With respect to the payment of the £8000, I take it as it stands exactly on the joint affidavit of Messrs. James and Wright. There are two passages which relate to it; they first of all state, “It was also agreed that the sum of £8000 should be advanced to the Manchester and Southampton Company on account of the expenses incurred in promoting and preparing the Ludgershall and Poole, otherwise Manchester and Poole line, in which the said South and Midland Company was about to acquire so large an interest, and which payment was to form an item to the credit of the South and Midland Company, in the final adjustment of accounts between the two Companies.”

Now, it appears to me, that that agreement, simply as an agreement by trustees to pay their cestui que trusts' money, not for a definite demand, but so as to make it form an item of account, was not the proper mode of dealing with the money of the cestuis que trust. And there is this further thing to be observed, that this last passage is, as it appears to me, something different from what

is subsequently stated: "That the said sum of £8000 so advanced to the Manchester and Southampton Company for such plans, sections, and expenses, is claimed by the defendants as directors of the South and Midland Company, but such claims, to some extent, have been resisted, and the rights and liabilities of the parties to the said sum of £8000 have been made the subject of a reference to counsel." You will observe, that, in the first instance, it is stated, that it was agreed that it should be advanced on account of the expenses incurred in promoting and preparing the Ludgershall and Poole, otherwise Manchester and Poole line; and now it says, that the sum of £8000, so advanced to the Manchester and Southampton Company for such plans, and sections, and expenses, is claimed by the defendants; so that it is left, on this affidavit, rather vaguely stated in respect of what the payment actually was: but I cannot think that it was a right thing to advance a solid sum with a feeling that the whole was not due on the speculation, and that the amount which was really due was to be settled in a future account. That does not appear to me to be a very wise or prudent mode of proceeding. If, indeed, it was the result of the agreement, why then the making the agreement is one of the very things complained of, because it becomes a question, as I said before, whether it was a thing authorised by the subscribers' contract. Mr. Stuart particularly noticed that section in the subscribers' contract which related to making "all such contracts and arrangements with railway or canal proprietors, land-owners, or any other persons." Now, I might have thought that those words would have applied to this case, if the Manchester and Poole Company had constructed a portion of their projected line, and had had power and were willing to sell it; and it would have been quite within the province of the 6th article of the subscribers' contract, that the directors of the South and Midland Company should have

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entered into a contract to purchase it; that I can understand: but it is quite a different thing where no line was completed, but, for the purpose of having some line completed not belonging to anybody, the directors of the South and Midland Company make a contract, by means of which they actually disable their own Company from acting by itself.

It strikes me, that some difficulty may arise in getting the money out of court, if it be allowed to remain in the names of the five. The mode of getting the money out is particularly prescribed by the act of Parliament; and it appears to me, that, if there was to be merely a stop upon the execution of the order, there may, for aught I know, arise some such circumstances as would prevent the money from ever being got out, unless a new act of Parliament should be passed; if, for instance, three of the five should die. It appears to me, that, if the parties agree to it, the proper order will be this: not to grant an injunction, but to let the money be paid to the three, on their undertaking forthwith to pay it into court. I throw this out for the consideration of the parties; if they will not do that, I must grant the injunction *simpliciter*.

Mr. *Stuart*.—We cannot agree to that, we think it would be a breach of trust.

The VICE-CHANCELLOR.—Then I must grant the injunction.

Motion granted

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BEFORE THE LORD CHANCELLOR.

LEWIS v. COOPER and Others.

On parties to the former suit of *Gilbert v. Cooper* having reached a compromise, the present plaintiff filed a bill pre-similar, *mutato nomine*, to the former one, and by motion moved before the Lord Chancellor for an injunction on the same terms as that granted by the Vice-Chancellor of England, so as in effect to obtain a decision on the merits from the judgment of the Court below.

Rolt and Mr. *Terrell*, in support of the motion.

Bethell and Mr. *Adams*, contra.

LORD CHANCELLOR, after hearing the arguments on both sides, was of opinion, that, although it might be inconvenient that the money of the South and Midland Company should go into the hands of three parties, two of whom were not directors of that Company, the injunction ought to have extended to those persons who were directors of the South and Midland Railway Company. His Lordship therefore, granted an injunction limiting it to the directors who had obtained the order on petition, without costs, on the ground that the injunction asked was not so extensive.

A petition was therefore presented (which was heard by motion by the Lord Chancellor) by such three of the directors whose names the Parliamentary deposit had been

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Under similar circumstances to those set forth in the preceding case, the Lord Chancellor granted an injunction, but without costs, against those persons only who were not directors of the original Company, but refused it as to those who were. An order for payment of the deposits out of Court to three of the directors of the South and Midland Company was accordingly made on another petition being presented by them to the Lord Chancellor for that purpose.

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made, as were directors in the original Company, praying for the payment of the fund in court to them.

Mr. *Bethell* objected to the payment to these parties; but subsequently it was arranged between him and Mr. *Rolt* (who appeared for the petitioners), that an order should be taken for payment to such three of the original directors of the South and Midland Company as they should mutually appoint.

The LORD CHANCELLOR made the order accordingly, remarking, that "the only allegation against the directors was, that possibly they went beyond their powers, but that nothing had been shewn which at all impugned the honesty of their motives."

BEFORE THE V. C. OF ENGLAND.

LEWIS v. BILLING and Others.

30th June,
1st July.

A bill was filed by L., stating himself to be a partner in a projected Company (which afterwards failed), against sixteen of the managing committee, and against B., a creditor of the

Company, who had commenced an action against L. for a debt due by the Company, praying an injunction to restrain the action brought by B., or by the other defendants in his name, and to restrain the committee from distributing the assets of the Company, except in discharge of the debts, and praying that all proper accounts might be taken. The defendant B. demurred for want of equity, for multifariousness, and for want of parties. Demurrers overruled.

THE bill in this case was filed by T. Lewis against sixteen of the promoters and managing committee of a projected Company, called "The Wolverhampton, Chester, and Birkenhead Junction Railway Company," and against W. Billing, a creditor of the Company, and it stated, that the Company was proposed to be established in the manner prescribed by the Act (a) for the Registration of Joint Stock Companies,

(a) 7 & 8 Vict. c. 110.

nd that the promoters obtained a certificate of provisional registration, and thereupon opened subscription lists, and proceeded to allot shares in the Company, and the proposed Company or partnership was, in October, 1845, duly formed and constituted, and the several defendants (other than L.) together with the plaintiff, became and then were partners therein, and were duly appointed members of a committee, called the Managing Committee of the Company, and in that character were authorised to receive and take charge of the monies of the Company; and the defendants had accordingly received considerable sums of money on behalf of the Company, amounting to more than £3000, which constituted the partnership assets, and were applicable to discharge the liabilities of the Company.

That there were debts of the Company outstanding to a very large amount, which the defendants ought to discharge out of the partnership assets in their possession, but which they refused to do: and in consequence of such refusal, the several persons to whom such outstanding debts were owing, threatened and intended to proceed at law against the plaintiff as one of the partners in the Company, and to compel payment by him personally of their debts.

That, amongst the outstanding debts of the Company, was a debt due to the defendant Billing for printing and engraving done on behalf of the Company; and that plaintiff was liable at law as a partner in the Company for that and the other outstanding debts of the Company.

That the monies in the possession or power of the defendants were in their possession or power as trustees, for the purpose of applying the same in discharge of the said debt, and of the other outstanding debts of the Company.

That a considerable portion of the debt which was originally owing to W. Billing, had been paid off by the other defendants, and the residue of the debt had been paid by them into the hands of the agents nominated by

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and on behalf of W. Billing; and the said debt had been assigned by him to the other defendants.

That the said W. B., notwithstanding such payment and deposit, had, at the request of the other defendants, brought an action against the plaintiff for his debt as trustee for and on behalf of the other defendants, and had been guaranteed and indemnified by them against all costs and other risks, &c. to be incurred by the action.

That the plaintiff had applied to the defendants to refrain from suing him, or causing him to be sued; and had applied to the defendants (other than the said W. B.), requested them to discharge all the outstanding liabilities of the Company out of the balance remaining in their possession or power; but the defendants refused to comply with either of the plaintiff's requests, unless the plaintiff would pay to the last-mentioned defendants £100, a sum which had been arbitrarily named by the defendants, and had not been ascertained by any account, or otherwise to be really due from the plaintiff as his share of the liabilities of the partnership, and which was not in fact due from him.

That he had refused to pay the said £100, on the ground that he was not liable for the same; but, nevertheless, the defendants had taken no proceedings, either at law or equity, to establish his liability to pay the said sum.

That the defendants (other than W. B.) were now availing themselves of the action brought by W. B. for the purpose of indirectly compelling the plaintiff to pay the said sum.

That the plaintiff had further applied to the last-mentioned defendants, not to distribute or part with the monies in their hands, except in payment of the liabilities of the Company, or in the carrying on and management of the partnership business of the Company, as long as the liabilities of the Company remained outstanding and

paid; but the defendants had refused so to do, and threatened and intended to distribute the said monies among themselves and other persons, whom they alleged to be members of the Company, leaving the outstanding debts of the Company still unpaid, and leaving plaintiff to be personally proceeded against by the creditors for payment thereof.

And the bill (amongst other charges with reference to the said debt) charged that other debts of the Company had been left unpaid, in order that the defendants (other than the said W. B.) might sue in the names of the creditors to whom the same were owing, and might thereby indirectly compel payment of the said sum of £100.

That the monies then in the hands of the said defendants (other than the said W. B.) were sufficient to discharge the said debt of the said W. B., and the other outstanding liabilities of the Company.

And the bill also charged that, by a resolution of the Company, it was declared, that any three of the acting committee should be empowered to sign cheques in their corporate capacity, and that some of the defendants, availing themselves of the said resolution, privately, and without the sanction or knowledge of the rest of the committee, signed two cheques on the bankers of the Company for £500 each, and applied the sums for purposes not sanctioned or known to the committee.

That the persons among whom the defendants intended to distribute the monies in their hands were, with the exception of plaintiff, all the partners in the Company, and that such persons were in some manner (though they refused to disclose in what manner) interested in the relief thereby sought, and necessary parties to this suit; and that the defendants were well acquainted with, but refused to inform plaintiff of the names and addresses of such persons, and plaintiff was ignorant thereof; and that such persons were very numerous, and more than 200 in number, and

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that their interests, so far as they were affected by the suit, were identical with those of the defendants, (other than W. B.), and that they were sufficiently represented in this suit by the defendants.

And the bill prayed, that the defendant W. B. might be restrained from prosecuting the action at law against the plaintiff, and from commencing or prosecuting any other action or suit against plaintiff in respect of his debt; and that the other defendants might be restrained from prosecuting the said action in the name of the said W. B., or otherwise, and from bringing any other action against plaintiff in the name of W. B., or in the name of any creditor of the Company, in respect of any debt due from the Company; and that they might further be restrained from distributing, paying away, or parting with the balance of the partnership assets of the Company, or any part thereof, except in payment of the liabilities of the Company, or in the carrying on and management of the partnership business of the Company, so long as any liabilities of the Company remained outstanding and unpaid; and that all proper accounts might be taken, directions given, and inquiries made, plaintiff thereby offering to pay any sum which might be properly due from him as a partner in the Company.

The defendant Billing demurred for want of equity, and because the bill was exhibited against him and the other defendants for several distinct matters, in many of which the defendant Billing was not interested; by reason of which matters the said bill was drawn out to a considerable length, and the defendant was compelled to take copies of the whole of the bill; and by separate and distinct matters being joined together, which did not depend on each other, the pleadings, orders, and proceedings would, in the progress of the suit, be intricate and prolix, and put the defendant to unreasonable and unnecessary expense.

A similar demurrer was put in by the other defendants, and a demurrer *ore tenus* for want of parties was also urged

at the hearing, on the ground that no shareholders had been made parties to the bill.

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Mr. *J. Parker*, and Mr. *Hallett*, in support of the demurrer.—There is nothing in the bill to shew that the alleged Company is legally constituted, or that it is in fact a Company: they are represented as assuming to act as a corporation, without having taken the means to invest themselves with corporate rights. It is not stated that the Company have complied with the terms of the 7 & 8 Vict. c. 110, (The Joint Stock Companies' Act); but if the Company be not legally constituted, or if it be a bubble, it is merely an association, which cannot be considered a partnership, and the plaintiff fails in making any title to the relief he seeks: *Duvergier v. Fellows* (a), *Blundell v. Winsor* (b), *Harrison v. Heathorn* (c), *Ewing v. Osbaldiston* (d), *Josephs v. Pebrer* (e). The case made by this bill is not sufficiently defined, and the demurrer ought to be allowed on this ground: *Cressett v. Mytton* (f), *Gell v. Hayward* (g), *Ryves v. Ryves* (h), *Mayor, &c. of London v. Levy* (i), *East India Company v. Henchman* (k), *Wormald v. De Lisle* (l), *Stansbury v. Arkwright* (m).

This bill is clearly demurrable for multifariousness: *Salvidge v. Hyde* (n), *Harrison v. Hogg* (o), *Attorney-General v. Goldsmiths' Company* (p), *Ward v. Duke of Northumberland* (q). There is no allegation in the bill that the plaintiff is a shareholder, and on this account the bill is demurrable: *Walburn v. Ingilby* (r). Some of the shareholders ought to be parties to this bill: if the Company is in fact a Company, then all the shareholders must be registered (s), and

(a) 5 Bing. 248.

(b) 8 Sim. 601.

(c) 6 M. & Gr. 81.

(d) 2 My. & Cr. 53.

(e) 3 B. & Cr. 639.

(f) 1 Ves. jun. 449.

(g) 1 Vern. 312.

(h) 3 Ves. jun. 343.

(i) 8 Ves. 398.

(k) 1 Ves. jun. 287.

(l) 3 Beav. 18.

(m) 6 Sim. 481.

(n) Jac. 151.

(o) 2 Ves. jun. 323.

(p) 5 Sim. 670.

(q) 2 Anstr. 469.

(r) 1 My. & K. 61.

(s) See antè, p. 258, n.

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if registered the allegation as to ignorance of the pa
 must fail to sustain the bill: *Wilson v. Stanhope* (a).

The VICE-CHANCELLOR (without hearing Mr. E and Mr. *Adams*, who appeared in support of the bi
 It is my opinion that this demurrer ought to be over
 It may perhaps be true, that in detail the circumst
 stated in the case of *Fernihough v. Leader* (b) are n
 same as in the case before me; nor is it necessary that
 should be the same, in order that the principle on
 the Court proceeded in that case should be the sa
 that acted upon in the present one. This case appe
 me to present a very plain equity by the bill as filed c
 part of the plaintiff, at least as against the defendant B
 It represents that certain persons wishing to form a
 pany incurred certain debts, one of which was due t
 Company to the defendant Billing, and for which h
 thought proper to sue the plaintiff as a partner lia
 him; and what is alleged in the bill is, that the oth
 fendants have received monies belonging to the Com
 which are in the hands of the parties who have rec
 them, applicable to the debts due from the Company
 therefore to the debt due from the Company to B
 and for which Billing has sued the plaintiff. It is
 sented, that in effect the debt has actually been pa
 that Billing is indemnified against any possible consequ
 of non-payment, and has assigned it to the defem
 and allowed them in fact to bring the action. No
 all this statement Billing is bound. The bill then is
 as I understand it, not for the purpose of carrying
 partnership into execution, nor for dissolving it, no
 interfering, except to this extent, that these monies
 the other defendants and Billing have in their hands
 be declared applicable to the payment of the debts due.

(a) Antè, p. 251.

(b) Antè, p. 373.

the partnership. That there is, then, a plain equity against Billing, no human being can doubt, because it is not equitable that a party whose debt has been paid should lend his name in order to enable the defendants, because a demand made by them has not been satisfied, to harass the plaintiff at law when they have money applicable to the payment of the debt. I know nothing of the facts, further than appears upon the face of the bill. It appears to me that a consistent case is stated on the bill, and a demurrer has been put in for want of equity: the mere statement disposes of that. Then it is said, that the bill is multifarious. I do not see it—it states the contraction of the debt, and other circumstances, but it makes it binding upon the other defendants, the cestui que trusts of the action, to apply the monies to the payment of the debt. What multifariousness is there in that? Now, Billing, by the nature of the proceeding, has implicated himself in the line of duty to be pursued by the defendants; this is a voluntary act, and he has blended himself with it. I do not think there is a want of parties.

As to the prolixity of the proceedings, it seems to have been the special care of the pleader (who, I must say, has drawn this bill in a very concise form) to avoid such an objection; the bill is filed for the purpose of having a limited distribution of the partnership assets; it only asks that something be done for the benefit of all, in which the absent can participate as well as the present.

I am not sure that this ought not to be treated as a speaking demurrer, because the framer of it has taken upon himself to say that the suit will be intricate and prolix, which does not appear on the record; but I do not wish to insist upon this, because I think that upon the substance of the case the demurrer ought to be overruled.

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BEFORE V. C. WIGRAM.

2nd, 3rd, &
14th July.

DOYLE and Another v. MUNTZ and Others.

A. and B., on behalf of themselves and all other shareholders of a Company provisionally registered, except the defendants, filed a bill against eighteen of the managing committee for an account of the expenses, and for a division thereof, rateably, on each share, and for a return of the residue to the shareholders; and also for payment of the deposits on shares reserved by the defendants, and that they might be decreed to make good all loss occasioned by their mismanagement; and also for an account of

the assets, and debts and liabilities, and for a receiver and injunction.

To this bill one of the defendants pleaded in bar, that B. had assigned his shares and interest to C.

Held, that the plea was good in substance, inasmuch as a state of circumstances which would prevent B., if sole plaintiff, from obtaining relief at the hearing, would not, on account of A. having a present interest, sustain the bill against a demurrer.

That, although the plea admits the allegations of a bill to be true, yet, if the bill do not shew a case under which one plaintiff would be entitled to relief, notwithstanding the assignment of his shares, and without reference to another plaintiff, the plea will be held good.

That, no case of liability being made by the bill, an allegation to that effect, raised by the argument, and only arising by implication from the circumstances stated, will not be held sufficient to sustain the bill.

That B., having assigned his shares, cannot, in the character of trustee, represent his assignee C., nor the absent shareholders on behalf of whom he professes to sue.

The plea in this case being too general in form, and not sufficiently detailing the particular transaction on which the plea was founded, the Court gave leave to amend, and reserved the costs.

THE bill in this suit was filed by T. Doyle and J. W. Scrivener, on behalf of themselves and all other the shareholders of a proposed company, called the Southampton, Manchester, and Oxford Junction Railway Company, except such of the shareholders as were thereafter named as defendants thereto, against eighteen of the managing committee of the Company; and after stating the several advertisements and prospectuses by which the objects of the Company were made known to the public, and also the provisional registration and formation of the Company, and the nomination of the defendants as the managing committee thereof, set forth that the plaintiffs applied for shares on the faith of the prospectuses, &c.; and thereupon twenty shares were allotted to the plaintiff T. D., and ten to the plaintiff J. W. S., in respect of which they respectively paid the deposits, and signed the parliamentary contract and the subscribers' agreement, and received the certificates of the Company.

That the proposed line was considered to be highly useful and advantageous, and to combine the advantages of other

proposed lines, and was therefore in great repute with the public; and that, notwithstanding this, the defendants had come to some arrangement for an amalgamation with the Oxford, Southampton, Gosport, and Portsmouth Railway Company, which the plaintiffs were advised was inconsistent with the original objects of the Company to which the plaintiffs had subscribed, and, in fact, that they had by this amalgamation abandoned the best part of the original line.

The bill then stated the comparative advantages of the abandoned line over that in which the defendants had embarked, and it stated that such arrangement had been entered into without in any way consulting the shareholders; and that the projected scheme had thereby entirely failed, and the further prosecution thereof would be useless, and tend to waste the funds of the shareholders.

That this arrangement was entered into in consequence of undue influence exercised by J. A., who was a shareholder in the Company with which the plaintiffs' Company had amalgamated, over R. S., his partner, who was the banker and one of the managing committee of the last-mentioned Company.

That some of the shares had been allotted, and a great number reserved, in fraud, and without the knowledge and to the injury of the plaintiffs, and solely with a view to the personal advantage of the defendants; and although more applications for shares than there were shares to allot, had been made by solvent persons, only 23,000 out of 36,000 shares had been allotted; and consequently the capital necessary for prosecuting the undertaking had not been subscribed.

The bill, after stating several breaches of trust on the part of the defendants, with reference to the allotment and undue reservation of shares; and also, that the defendants had not accepted the shares reserved by and for themselves, or paid the deposits thereon; and that the defendants had

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laid out the capital of the Company in the purchase of scrip shares at a premium, and particularly that a sum of £121 had been paid to B. B. Williams, (a defendant), for raising the price of the shares, contained allegations as to the impossibility of making all the shareholders parties (a), and prayed that the defendants might be decreed to repay the plaintiffs the full amount of the deposits paid by them with interest; or if the Court should be of opinion that the plaintiffs were not entitled to the whole of such deposits, but that the same were liable to the expenses incurred in promoting the Company, then the bill prayed an account of such expenses, and that they might be divided rateably on each share in the Company; and that the defendants might be held liable in respect of all shares reserved or improperly allotted, on which no deposit had been paid, and might be decreed to return to the plaintiffs the residue of their deposits, after deducting thereout the proportionate amount of the expenses. Or that an account might be taken of the dealings and transactions of the defendants, with respect to the Company; and that they might be decreed to pay the deposits upon the shares reserved by them, or which had been improperly allotted and on which the deposit had not been paid, together with the said sum of 1218*l.*; and that the defendants might be decreed to make good to the Company all loss occasioned by their mismanagement, misconduct, or neglect (b). The bill also prayed an account of the property of the Company, including such amount as might be found due from the defendants; and also a receiver, and an injunction against the defendants; and further, an account of the debts and liabilities of the Company.

(a) These were similar in all respects to those contained in *Wilson v. Stanhope*, antè, p. 259. marks on the alternative request prayed by the bill. Question whether it was not demurrable.

(b) His Honor, in the course of the argument, made some remarks on this ground. See *Seddon v. Cell*, 10 Sim. 79.

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To this bill, and to the discovery and relief thereby sought, one of the defendants pleaded in bar, that, before the filing of the bill, the ten shares allotted to the plaintiff,

J. W. S., and all right, &c., had been assigned by the said J. W. S. to H. Heald, or to some other person whose name and address were unknown to the defendant, and by whom the same had afterwards in like manner been assigned and transferred; and that, at the time when the said bill was filed, the said ten shares and each &c., were and was, under and by virtue of such sale, assignment, and transfer, well and effectually vested in H. H., for full and valuable consideration; and that the plaintiff J. W. S. had not at the time of filing the bill, and had not at any time since, and had not then any right, title, or interest in or to the said ten shares, or any or either of them, or to or in the said Company, or the affairs, concerns, or assets thereof, in respect of such shares, &c.

Mr. Romilly, Mr. James Parker, Mr. Bazalgette, and Mr. I. Spooner, in support of the plea.—The bill is framed wholly on the right of the plaintiffs in respect of the scrip shares allotted to them, but the plaintiff J. W. S., by the assignment of his ten shares, has parted with all his interest in them and in the affairs of the Company, and has no longer any title to relief in respect thereof. That he had power so to transfer his shares, appears from

the cases of *Young v. Smith* (a) and *Lawton v. Hickman* (b).

The bill, then, can only be supported on the ground that

the plaintiff remains liable in respect of his covenant in the subscription contract, and of calls hereafter to be made on the shares originally allotted to him. There is not a single statement or allegation in the bill that the plaintiff remains liable in any way to the Company; and therefore it is by conclusion of law alone that such liability can be deduced from the bill. The plaintiff does not hold him-

(a) Antè, p. 135.

(b) Antè, p. 336.

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self out as one of the managing committee of the Company, and therefore cannot be considered personally liable to strangers: *Todd v. Emly* (a). If any relief can be given to the plaintiff by this bill, it follows that some right in respect of a share, although assigned, must exist; and it is necessary that this absurd conclusion be come to, viz. —that a party who has sold and received money for his share might demand that money over again from the Company. The bill, framed as it is, clearly contemplates no liability, and it makes out such a case of breach of trust against the defendants, as, if proved, would free the shareholders, and throw all the liability and charges upon the defendants. It would, in fact, cause the dissolution of the Company, and the return of the deposits to the scripholders. But if the Court should be of opinion that the plaintiff has no existing right, and that no liability exists, or is alleged on the bill, then the bill must be dismissed, for a party having no interest is made co-plaintiff with one having an interest: *Davies v. Quarterman* (b), *King of Spain v. Machado* (c), *Makepeace v. Haythorne* (d). The plaintiff is not a partner: *Walstab v. Spottiswoode* (e). If the bill fails as to the claim of J. W. S., it must be dismissed as against the other complainant: *Cowley v. Cowley* (f). This is clearly a misjoinder of plaintiffs. The Court will not permit a husband to sue with his wife in respect of her separate property: *Wake v. Parker* (g); much less a stranger to sue for others having conflicting interests: *Glyn v. Soares* (h), *Richardson v. Larpent* (i), *Lund v. Blanshard* (k).

The *Vice-Chancellor*, to the counsel for the plaintiffs.—
“Shew me why Heald is not a necessary party to this bill.”

(a) 8 M. & W. 505.

(b) 4 Yo. & Coll. Ex. Rep. 257.

(c) 4 Russ. 225.

(d) Id. 245.

(e) Antè, p. 321.

(f) 9 Sim. 299.

(g) 2 Keen, 59.

(h) 3 My. & K. 450.

(i) 2 Yo. & Coll. Ch. Rep. 507.

(k) 4 Hare, 290.

Mr. *K. Parker* and Mr. *Hetherington*.—The assignee of the shares is to all intents and purposes a shareholder, and, as such, is represented by the plaintiffs, who sue on behalf of all shareholders: *Ryan v. Anderson* (a), *Small v. Attwood* (b).

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The subscribers are clearly liable under the contract which they have signed, until the full amount of the share has been paid up. The plaintiff Scrivener has subscribed to the terms, and is therefore liable to the trustees of that contract, and is also liable to the creditors of the Company. The plea does not shew that the assignee has signed the deed whereby it might be possible that he had divested the subscriber of his liability, and therefore the subscriber still remains liable.

The VICE-CHANCELLOR.—The question in this case is, whether this plea in bar is good or not. For the purpose of trying its sufficiency I will assume, that, at the time the bill was filed, the ten shares, and each and every of them, and all right, title, and interest in and to them by virtue of the sale, were well and effectually vested in Heald for valuable consideration. Then two questions arise, viz. first—did that fact, if well pleaded, deprive the plaintiff of all right to discovery and relief? that is, is the plea good in substance? Secondly, Is it well pleaded? In considering the former question I assume that the latter is to be answered in the pleader's favour. Now, on the question whether the plea is good in substance, the case must depend upon and abide by the same considerations which would apply if Scrivener were the sole plaintiff. If Doyle were to die before the hearing, and his representative did not revive the suit, Scrivener would become the sole plaintiff, and if that want of interest in Scrivener which the plea suggests, and that state of circumstances, would prevent

(a) 3 Madd. 174.

(b) Yo. Eq. Ex. Rep. 407.

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him, as sole plaintiff, from obtaining relief at the hearing, the circumstance of Doyle having a present interest will not alter the case. The bill, if that fact had appeared on the face of it, would, according to the cases, have been demurrable: *The King of Spain v. Machado* (a), *Makepeace v. Haythorne* (b), *Small v. Attwood* (c). That the ten shares were assignable as between Scrivener and Heald, does not admit of doubt, and that they were also assignable as between those parties on the one side and the Company on the other, must, upon these pleadings, be assumed. There is nothing in the bill to exclude it, and nothing to make the assignment illegal in the abstract: *Young v. Smith* (d). Assuming that the ten shares were assignable, and that they were well assigned to Heald, what personal interest has Scrivener to enable him to sustain the suit? It was for Heald and not for Scrivener to determine whether the arrangement alleged to have been come to between the Southampton, Portsmouth, and Gosport Railway Company, and the Southampton, Oxford and Manchester Railway Company, should be supported, and whether the acts of the provisional directors (which the bill alleges to have been done by them without consulting the shareholder) should be rejected or adopted; and upon the same assumption, the manner in which the provisional directors have dealt with the shares and the assets of the Company is a matter in which Scrivener can have no personal interest, so far as the acts of the provisional directors are concerned, have merely checked the prosperity of the concern.

But it was said for the plaintiffs, that although Scrivener, as a retired shareholder, has no direct interest in the Company, yet that he has an interest in seeing that the assets are properly applied towards the discharge of

(a) 4 Russ. 225.

(b) Id. 245.

(c) Yo. Eq. Ex. Rep. 407.

(d) Antè, p. 135. See also *Lawton v. Hickman*, antè, p. 301

ities to which he made himself personally liable. If admitted, would strike out every part of the prayer, and would convert the bill into a bill of relief merely, giving to Scrivener a character different from that in which he appears upon the record. It is not, however, in taking a view of this part of the bill. I should suppose Scrivener, under some circumstances, to be entitled to such an indemnity as the arguments suggest. The questions then are—Do those circumstances exist here? and are the statements in the bill sufficient to entitle him to indemnity, treating the prayer of the bill as adapted to that purpose? I have read every part of the bill for the purpose of ascertaining whether any case is suggested upon the record, but I do not find any suggestion in any part of it. There is no suggestion of any deficiency of assets, which, as between Scrivener and the other shareholders, might render him liable for the debt; nor is a case stated, from which it is to be inferred that Scrivener has made himself personally liable to the demands of strangers against the Company, if any. The conclusive answer to this bill appears to be in favor of the assignment of Scrivener's shares to Heald, in the absence of any express contract between them. A person who sells his interest in a concern, cannot, in the absence of an express contract, insist upon his right to interfere in the affairs or conduct of the concern after such sale. If, however, such a case exist, it is incumbent on Scrivener to state it. The relief asked by this bill, unless warranted by an express contract between Scrivener and Heald, is in derogation of Heald's rights.

In conclusion, therefore, as far as relates to Scrivener, if Scrivener had sold his shares to Heald, the bill would not state a case shewing that Scrivener has any interest in the concern entitling him to relief in this respect thereof. But it was said that Scrivener, having signed the subscribers' agreement and the parlia-

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mentary contract, and nothing having been done to substitute Heald for Scrivener, he, Scrivener, remained a trustee, or is to be viewed as a trustee for Heald, and in that character represents Heald upon the record. Without repeating that the character in which Scrivener is suing here is not that of trustee, my opinion is, that Scrivener cannot sustain this suit in the view of the case above suggested. But it was said, that, this being a bill filed on behalf of the plaintiffs and all other the shareholders, Heald, in respect of his beneficial interest, is included in the general description of other shareholders. That argument is not strictly accurate in point of language. "Other shareholders" must mean holders of shares other than those held by the plaintiffs, and that observation is not merely formal. The Court, in cases like this, permits a small number of shareholders to sue on behalf of themselves and others, assuming the absent shareholders are adequately represented by parties having the same interest with themselves. But that rule would not permit a mere trustee, who has no beneficial interest, to represent the absent shareholders; that would in effect enable a trustee to represent his own *cestui que trust*. If Heald is a shareholder, there is no reason why he should not be in the suit, and why the real case should not be put upon the record. It is further said, that the objection resolves itself into an objection for want of parties, and that the plea, being a plea in bar, would on that account fail. With that argument I do not agree. A plea of want of parties admits the plaintiff is entitled to relief, provided the proper parties are brought before the Court. And it seems impossible to read this record as containing such an admission. Will the Court, at the hearing of the cause, permit the amendment, while the record asserts that Scrivener is the owner of shares? If so, will Heald join with Scrivener as plaintiff? And if he will not, and he should be made defendant, will he adopt or reject the acts of Scrivener in the suit?

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These questions appear to me most material in considering the case. In order that the plaintiff may sustain his bill against the plea, it is not enough to shew, that, by means of some alteration to be made in the suit and of some possible course to be taken, the suit is to be made available. It must be shewn, that, according to the case made by the bill, the plaintiff will necessarily be entitled to some relief, whatever course Heald may take. The plea admits the allegations in the bill to be true, but unless it follows that relief must be given according to those allegations, and in spite of the assignment of the shares, the plea will be good. The rule laid down by Lord Eldon in *Kemp v. Pryor* (a) reversing his former opinion, and after a second argument, must, I consider, for the present purpose apply to a plea of this sort.

The remaining question, viz., as to the form of the plea, is one, as it appears to me, of greater difficulty than that which I have noticed. I do not refer to that part of the plea relating to the assignment, upon which, standing alone, there would be a good deal of doubt, for that I think is made clear by what follows. It means that there has been a sale or assignment from Scrivener to some one else who had assigned them to Heald, and there is a positive averment that at the time of filing the bill Heald was the owner of the shares. The difficulty I have felt as to the form of the plea, and which has not been wholly removed, is this, that the plea is so general that there is no detailed statement as to what the real transaction is, which the defendant says amounts to a sale of shares or the assignment of them. It is possible, although I admit it is scarcely to be said to be reasonably probable, that the plaintiff did not know what the transaction was, if there was one, which it must be assumed the plea alluded to. This has been the occasion of the delay in my giving judgment

(a) 7 Ves. 245.

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in this case as to the manner in which I should deal with the plea. The course which I shall take is that which certainly will best meet the justice of the case, and by which no rule of law is violated. I will allow the plea, but give the plaintiff leave to amend, reserving the costs of the plea to be disposed of until the hearing of the cause or further order.

V. C. OF ENGLAND AND LORD CHANCELLOR.

24th & 25th
June,
9th, 11th, &
29th July.

COLOMBINE v. CHICHESTER and Others.

Plaintiff, the
promoter of a
railway project,
entered into an
agreement
with a com-

THE bill in this case was filed on the 21st of April, 1846, and contained the following statements:—

That in May, 1845, plaintiff and W. A. projected the committee formed for carrying the same into effect, and consisting of thirteen persons, [A., B., C., D., E., F., G., H., J., K., L., M., and N.], that he should receive 1,500 shares (deposit free) for promoting and launching the Company, and should be retained as their solicitor, and receive the amount of costs and expenses incurred when there should be sufficient funds in hand for that purpose.

A subscription deed was entered into, whereby all the members of the original committee (except A.), together with O., were nominated as the provisional committee of the Company, and the usual powers of removing and filling vacancies were given them, and it was declared, that the majority of votes present at any meeting of the committee should bind the rest, and also the shareholders.

The provisional committee removed J. and K., two of the members of the original committee, and appointed P. and Q. in their places.

The terms of the original agreement were afterwards varied, and when varied, were consented to by the committee, and entered in the minute-book of the Company.

The bill was filed against all the members of the original and provisional committee, except A., J., and K., for the specific performance of the agreement as varied, for restraining the members in whose hands the funds of the Company were, from parting with any of them until plaintiff's demands had been satisfied, and for a declaration that plaintiff was entitled to a lien thereon.

The bill (among other things) charged, that the stipulation as to the retainer of the plaintiff as the solicitor of the Company had been long since abandoned by both parties.

Held, by the Vice-Chancellor of England, that a demurrer for want of equity and for want of parties be overruled.

That an agreement containing a stipulation which might vitiate it, becomes perfect and such as a Court of equity will sanction, when parties mutually release each other from that stipulation.

Held, by the Lord Chancellor, on appeal, that the demurrer be allowed, on the ground that the bill contained no allegations to shew that the defendants had any scrip to deliver, but rather statements from which the contrary might be inferred.

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formation of a joint-stock Company, which they caused to be provisionally registered by the name of the "London and Exeter Direct Railway Company," which name was afterwards altered, (in consequence of a project to that effect), by adding the words, "with an extension to Falmouth and Penzance." That the plaintiff, at his own risk and expense, printed and circulated advertisements and prospectuses detailing the objects and advantages of the proposed Company, and at his own expense took various journeys to the places along the line of the proposed Railway, and received applications for shares from responsible and respectable persons, to an amount exceeding the whole number required for raising the necessary capital of the Company.

That in September, 1845, thirteen persons [A., B., C., D., E., F., G., H., J., K., L., M., and N., all of whom, except A., J., and K., were defendants], consented to act as the provisional committee of the Company, and so continued down to the date of the agreement after mentioned, and no other persons were, at the time of making such agreement, members of the provisional committee, or, exclusive of plaintiff, had any authority to interfere in the conduct or management of the affairs of the Company. That, in September, the provisional committee were desirous of getting into their own hands the entire conduct and management of the project, and proposed to negotiate with the plaintiff for the surrender by way of purchase from him of all his interest in the Company, and at a meeting of the committee held on the 29th of September, the terms of the agreement were finally settled and agreed between the plaintiff and the provisional committee, that in consideration of plaintiff's giving up to them all his interest in the Company, and as a remuneration for the pains and trouble which plaintiff had been at, in procuring and completing the foundation of the Company, the plaintiff should receive 1500 shares in the Company, on which a deposit of 1*l.* 7*s.* 6*d.* per share

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should be considered as paid; and it was further agreed that such agreement should take effect as from the 16th of September; and accordingly the plaintiff, on the same 29th of September, drew up a memorandum in writing containing the terms of their agreement, which was duly signed by plaintiff, and delivered to the provisional committee, and accepted by them, and a resolution approving thereof was passed and entered in the minutes of their proceedings; and thereupon the plaintiff gave up to the provisional committee the entire and exclusive management of the Company, and placed at their control all the papers and documents in his possession, and thenceforth ceased to have any control, and take any part in the management or conduct of the affairs of the Company, except as joint solicitor, and as acting under the direction of the committee; and the provisional committee, in part performance of the agreement on the part, paid and discharged the liabilities which plaintiff had incurred in the formation of the Company.

That the provisional committee, after their agreement with plaintiff, made an allotment of shares in the Company to various persons, and received deposits thereon to a large amount; and they might, if they had thought proper, have made an allotment of shares to respectable and responsible applicants to the extent of the whole amount of capital required for the Company; and they, in fact, represented that they had allotted the whole of the shares, for, on the 17th of October, 1845, they caused an advertisement to be published, giving notice that they had completed the allotment of shares, and that the usual letters were then issued and containing an apology to the applicants who had not received allotments of shares.

That the provisional committee, after the allotment of shares, caused a subscription contract to be prepared and executed by the shareholders in the Company, and thereafter the original committee (except A.), together with O., (also defendant), were appointed the provisional committee of the

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Company, with power to add to their number, and to remove any member of the provisional committee, and to fill up vacancies, and with a declaration that a majority of the votes of the members of the committee should bind all absent members of the committee, and also the general body of shareholders. That the several persons so last appointed to be the provisional committee of the Company adopted and confirmed the agreement entered into with the plaintiff.

That A. had, previously to the date of the subscription contract, ceased to be a member of the provisional committee, and that J. and K. had been removed, and had ceased to be members of the committee since the date of that contract, and had not then any interest in the affairs of the Company, and P. and Q., (also defendants), had been appointed and were then members of the provisional committee.

That shortly after the allotment of shares had been made, disputes and differences arose between various members of the provisional committee as to the manner of allotment; and plaintiff complained that, as the fact was, no shares had been allotted to him previous to his agreement of September, although plaintiff had made several applications for that purpose, and, at the request of the secretary of the Company, plaintiff again sent a copy of the agreement to be submitted to the board.

That a meeting of the provisional committee was held on the 8th of November, at which the agreement with the plaintiff was discussed, and a question was raised as to the legal validity of it, and the opinion of counsel was taken thereon, which was in favour of plaintiff, so far as related to the delivery of the 1500 shares to plaintiff, and he thereupon pressed the performance of the agreement.

That in the month of December, by reason of disputes and differences, and the alleged mismanagement of the affairs of the Company, the shares were at a discount, and

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a meeting was advertised for the 15th of December, to obtain the sanction of the shareholders as to the past proceedings of the committee, and to consult as to the future management of the affairs of the Company. And that, at the suggestion of the chairman, O., plaintiff addressed a letter to the provisional committee, dated the 5th December, which was as follows:—"In consequence of the present state of affairs with regard to the Direct Exeter Railway, I feel called on, in justice to myself, and the labours bestowed by me in furtherance of the objects of the Company from May till the month of September, when a contract was made for apportioning to me 1500 shares, on which the deposit of 1*l.* 7*s.* 6*d.* should be considered as paid, to beg that your earnest attention be given to that agreement, and that you will inform me what course you intend to pursue relative to it. No shares having been given to me when the scrip was issued, my situation is materially altered and damaged. At that period they bore a premium in the market, varying from 10*s.* to 12*s.* 6*d.* It was the duty of the allotment or general committee, to have set apart the shares necessary for me; and for the want of this, great damage has been the result. In the present state to which the affairs of the Company have been reduced by the policy adopted, the 1500 shares would be nearly valueless; and I conceive the least I can now expect is to receive a sum of money equal to the deposits on 1500 shares, of which I was deprived at a period when they ought to have been tendered to me by the Company. As it is of essential importance to have this question disposed of before the public meeting, I beg the favour of an immediate answer to this application."

That two days previously to the day advertised for the general meeting, a meeting of the provisional committee was held, for the purpose of discussing with plaintiff the manner in which the agreement with him should be performed; and after discussion it was proposed by the plaintiff, and agreed to by the committee, that he should receive 1000 shares, with the deposit paid up, and the sum of 812*l.* 10*s.* in cash;

and O. drew up a memorandum in writing, containing the proposed terms agreed to by the committee, which was signed by him and C. on behalf of the Company.

That at another meeting, held previous to the public meeting, and pursuant to arrangement, on the same day, a resolution was duly passed and entered in the books of the committee, confirming the agreement as varied, and directed the payment of the sum of 812*l.* 10*s.*, and the delivery of 1000 shares to the plaintiff; and a check was drawn and signed in favour of plaintiff; but the meeting having broken up suddenly, the check was, by accident, not then delivered to the plaintiff.

That the public meeting was held, at which the provisional committee took credit for a sum of £4346, as money paid by them for preliminary expenses, which comprised the amount of the check and the deposit on 1000 shares agreed to be delivered to plaintiff. That since the meeting plaintiff had applied to the provisional committee for the check, and scrip certificates for 1000 shares, with the deposit, but they had refused; and the bill [amongst other charges set out in the judgment] charged that the stipulations as to the employment of the plaintiff as the solicitor of the Company, was distinct from the agreement of September, 1845, and had been abandoned both by the plaintiff and the provisional committee, and that plaintiff had ceased to be the solicitor of the Company.

That the project was of great value, by reason of its having been registered at a time when a deposit of only £5 per cent. upon the capital was required (a).

That, in consequence of disputes and differences between the members of the provisional committee, several members thereof, and in particular C., D., E., F., G., L., and M., had refused to interfere in the management of the affairs of the Company; and O., P., Q., together with B., H., and

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(a) Now £10 per cent.

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N., had, in fact, lately taken upon themselves the conduct and management of the affairs of the Company and that O., P., and Q. had, with the connivance of the provisional committee, taken possession of the monies and funds of the Company. That Messrs. Currie had duly appointed the bankers of the Company, and a bank account was opened, &c.; and that in the beginning of December, 1845, there was a balance in their hands of £100,000 and upwards; but shortly previous to the meeting of the 15th December, O. procured the balance to be paid to himself, and afterwards, with the privity of P. and Q., passed the same into the banking-house of Messrs. S. and Co. (O. and Q. were private bankers), and by such means the whole of the monies and funds of the Company had for some time past and then were, in fact, in the exclusive power of O., P., and Q. That actions, suits, and proceedings, were brought against the provisional committee, and that O., P., and Q. intended to apply the monies and funds of the Company in defraying the expenses of defending the actions, &c. and in paying the damages, &c.

That O., P., and Q. had in their hands more than sufficient to pay to plaintiff the 812*l.* 10*s.*, and that they destroyed or cancelled the check.

That the shareholders in the Company were various; and, in fact, so numerous, that they could not, without the greatest inconvenience, be made parties to the actions; and that the defendants, B., C., D., E., F., G., H., O., P., and Q. had been duly constituted and authorised by the shareholders of the Company, and were true and lawful representatives of the Company, with full power to manage their affairs, and that they fully represented the rights and interests of the shareholders in all matters relating to the Company, and that no person other than the defendants was a trustee of the Company, or had any power to manage or conduct the affairs of the Company, or to represent the rights or interests of the shareholders.

That plaintiff had a lien on the funds of the Company for the said sum of 812*l.* 10*s.*

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The bill prayed that it might be declared that the defendants were bound by virtue of the agreement of the 16th September, and the minute or memorandum varying the terms thereof at the meeting of the 13th December, and might accordingly be decreed to perform the same; and for that purpose to pay to plaintiff the sum of 812*l.* 10*s.*, and also to deliver to plaintiff scrip certificates for 1000 shares of £25 each in the said Company, called "The Direct London and Exeter Company," with a receipt or acknowledgment that the sum of 1*l.* 7*s.* 6*d.* upon each of such shares had been paid up, plaintiff being ready and willing, and thereby offering to accept such shares, and to execute such deeds, or other instruments, as might be necessary or proper to be executed by plaintiff as the owner of such shares, and that it might be declared that plaintiff was entitled to a lien upon the money and funds of the said Company for payment of the said sum of 812*l.* 10*s.*; and that, in the meantime, the defendants, O., P., and Q., be restrained, by injunction, from paying, parting with, or in any manner disposing, or authorising the disposition of, the monies and funds of the Company, or any part thereof.

To this bill a joint demurrer was put in by the defendants O., P., and Q., for want of equity and for want of parties. The demurrer for want of parties objected, 1st, that the shareholders other than those in the bill named as defendants;—2ndly, that the persons interested in the funds of the Company upon which plaintiff claimed a lien—and, 3rdly, that A., J., and K., were all necessary parties.

A similar demurrer was put in by the defendant G.

Mr. *Stuart* and Mr. *Hetherington* in support of the demurrers of O., P., and Q.

Mr. *Bacon*, with whom was Mr. *Hetherington*, in support of the demurrer of G.

It does not appear from the bill that this Company

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has ever obtained a certificate of complete registration, in compliance with the Joint Stock Companies Act, and, until such certificate is obtained, the committee can only be considered as promoters (7 & 8 Vict. c. 110, ss. 3, 4, and 23). In this character they had no right to enter into such an agreement as is stated on the bill, with one of their own body. There is no consideration for the agreement—the demand is exorbitant, and the project has been proved to be as valueless as the services alleged by the plaintiff to have been performed by him. But such an agreement as that entered into with the plaintiff is in itself illegal. The committee, who are in the character of trustees for the shareholders, have no right or power to part with the scrip shares, except on payment of the sum fixed as the amount of deposit due on each share. The Court cannot decree a specific performance by ordering that 1000 shares be allotted to the plaintiff, as it is not stated in the bill that the defendants have any shares in their possession; and again, a specific performance of this agreement would, if decreed, be a fraud on the other shareholders, and a breach of trust on the part of the committee. But, if it be said, that the defendants can go into the market and purchase shares, then it will be seen that the plaintiff's remedy is by action at law for the value of the shares. But, even if the defendants are in a situation to allot 1000 shares to the plaintiff, the Court is precluded from granting the relief sought by the bill, inasmuch as it in part prays for a specific performance by payment of money, which this Court will never enforce. The prayer of the bill must be taken together, and, failing as to part, the whole must be refused. Scrip shares are not the subject of specific performance; and it is extremely doubtful whether any dealing with scrip shares in a projected company can be recognised by the Court: *Jackson v. Cocker* (a). The agreement is in itself illegal, because it stipulates for the employment

(a) 4 Beav. 59.

of the plaintiff as solicitor of the Company, and for his costs, charges, and expenses.

The allegations and the prayer of the bill are inconsistent; for the allegations are—that the shareholders are applying for the return of their deposits; and the prayer asks a payment out of those very deposits.

The Court will not grant the relief prayed, in the absence of those persons who, by the allegations in the bill, claim an interest in the deposits distinct from the committee, viz. the shareholders: *Richardson v. Larpent* (a).

If the Company is now at an end, all the partners are necessary parties to the bill; if it go on, they are also necessary parties to see that the contract of their committee does not part with their money illegally.

All the parties to a contract are necessary parties to a bill for the performance of that contract; but in this case, A., J., and K., all of whom were parties to the original agreement with the plaintiff, are not before the Court. They may part with any interest they may take under the contract, but they cannot get rid of their liability by ceasing to be members of the provisional committee.

Mr. *Bethell*, Mr. *J. Parker*, and Mr. *T. S. Daniel*, in support of the bill, contended that the agreement was founded on sufficient consideration, and having been ratified by the provisional committee, who, by the subscribers' contract, had power to act for the shareholders, it must necessarily be binding on them. That the plaintiff had offered to sell his information, plans, &c., for a sum of money, and those to whom that offer was made had the power of accepting or, if they considered it exorbitant, of rejecting it; at all events, that was a question which could not be argued on demurrer. There is nothing in the Act of the 7th and 8th of Vict. c. 110, to prevent the allotment of shares without the

(a) 2 Yo. & Col. 507.

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payment of any deposit,—the 23rd section gives the committee power to allot shares and receive deposits, “not exceeding 10*s.* for every £100 on the amount of every share in the capital of the intended Company.” It does not say that they shall not allot except on the payment of a deposit of not less than 10*s.* on each share. There is nothing sought by this bill but the delivery of the scrip certificates, which clearly are the subject of specific performance: *Ex parte Kensington* (a), *Doloret v. Rothschild* (b), *Duncuft v. Albrecht* (c), *Young v. Smith* (d).

The Court cannot presume that the committee have rendered themselves incapable to perform their contract; they must have had shares at the time of the contract, and it is not alleged on the bill that they have parted with all.

On the question of parties, the case of *Parsons v. Spooner* (e) was cited.

Mr. *Stuart* replied.

The VICE-CHANCELLOR.—It appears to me that a sufficient case is stated on the bill; and from the manner in which that case is stated, I think it may be taken to represent the real facts. What is represented is this—that the plaintiff, at the suggestion of his own mind, made various inquiries, and held a correspondence with a great many persons and acquired a vast deal of information, from which it appeared to him that the railroad in question (a direct railroad from London to Exeter) might be made advantageously to all those who were willing to become shareholders in the Company for making the same. And having done that, he caused the project to be provisionally registered, and treated with certain persons, who agreed with him, that if he would give up to them all the infor-

(a) 2 Ves. & Bea. 79.

(b) 1 Sim. & Stu. 590.

(c) 12 Sim. 189.

(d) Ante, p. 135. See also *Lawton v. Hickman*, ante, p. 336.

(e) Ante, p. 163.

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nation he had acquired, and the books, papers, &c., they would give him a remuneration, which was to consist of 1500 shares, in respect of which he should be freed from the obligation of paying 1*l.* 7*s.* 6*d.* per share deposit. I do not conceive that there was anything wrong in this agreement; it was in itself fair, and the only possible mode of disputing it would be by saying that too much was given. It does not appear that any deceit or any unfair influence was used; and those who were to judge of the matter, themselves, agreed what should be the payment made to the plaintiff. I really cannot see any objection upon the face of this transaction. The agreement does contain a stipulation that the plaintiff should be employed as the solicitor of the Company, but it is charged in the bill that that has been long since abandoned. If an agreement between A. and B. once contained something which would vitiate it, yet when the parties mutually release each other from that portion of the agreement, I apprehend the agreement becomes perfect, and such as a Court of equity will sanction.

It appears that this agreement, having been made in the manner stated in the bill, was afterwards varied by what took place in December, which variation amounted only to this, that instead of receiving 1500 shares, with the deposit, as it were, paid, it was agreed that the plaintiff should receive 1000 shares, deposit paid, and also a sum of 812*l.* 10*s.*, which was in fact nothing more than converting 500 of the shares into money, and giving him the value of them at 1*l.* 7*s.* 6*d.* in money, and £125 more.

I cannot but think that the matter is stated with sufficient accuracy, [His Honor then read that portion of the bill which related to the meetings of the 13th and 15th of December (a)], and that the agreement is in its terms and form sufficiently precise for the Court to act upon.

(a) Ante, p. 435 et seq.

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With respect to the objection, that there was no mutuality in the contract, the plaintiff in the most distinct terms has stated that he has performed all he undertook to perform, for he states in one part of his bill, that he expended time, labour, and skill in maturing the project and had collected much information and many materials towards the formation of the said Company, and particularly in respect of the number and arrangement of the applications for shares in the said Company, and the collection of evidence relative to the responsibility and solvency of the persons applying for such shares, and that the materials and information so collected by plaintiff were obtained at great pains and labour, and that the same was necessary and essential to enable the committee to make a proper allotment of shares in the Company; and the committee by virtue of the agreement of the 16th of September, 1846, acquired and had the full benefit of such materials and information: and that upon the faith of the agreement he performed by the provisional committee, plaintiff came up to them, and they took possession of the entire management of the said project and all the papers, documents, and information in plaintiff's possession or power relating thereto, and in particular the lot of applications for shares arranged, as in the bill mentioned, and also the information obtained with reference to the applicants; so that on the face of this bill the plaintiff appears to have acted and done all that he undertook to do.

It has been argued, that the bill seeks in effect to do that which cannot be done. Now, if the bill in distinct terms had stated that all the shares had been allotted, I admit there would have been some foundation for objection; but I do not find (although in the course of my argument I have particularly searched for the passage relating to the allotment) any allegation which amounts to this. In the first place, the provisional committee had power of allotting all the shares, and that power ren-

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in them, except so far as it appears on the face of the bill to have been taken away from them. [His Honor then read the passages in the bill relating to the allotment of the shares (*a*)]. The bill states that the committee might have made allotments to the extent of the whole amount of the capital required for the Company if they had thought proper; but there is not any statement whatever that they had done so, and the mere statement that they had made some allotment of shares is not a statement that they had allotted *all*. It appears to me that I am not at liberty to assume upon the face of this bill that those who have the direction of the affairs of the Company have not now a power of allotting shares.

I do not see what stress,—that is, what valuable stress is to be laid upon the fact, that the plaintiff speaks about scrip certificates, for I apprehend that what he asks would be scrip certificates until all the deposits are paid up, and then only the parties would become shareholders, when, by means of the registration of their names as shareholders who had paid up all their deposits, they would become entitled to shares instead of scrip. It appears to me, that when the plaintiff is asking for scrip certificates he is asking for the very thing that was bargained for, viz. shares to be allotted, with a certain deposit to be considered as paid up.

It is then said that the committee had no power to allot shares except on receiving the deposit: this really appears to me to amount to nothing. They had power to allot shares and to receive deposits; but if they owed money to a person who came for shares, and they merely allotted to him as many shares as would make the amount of deposit payable in respect of them equal to the amount of the debt, I cannot see that it would be necessary that the formality should be gone through of the plaintiff first of all

(*a*) Ante, p. 435.

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handing to the committee the amount of his credit in the shape of deposit on shares, and that they should, together with the shares, hand back to plaintiff what they had so received for deposit, in payment of their debt to him. It appears to me quite idle to insist on any such formality.

It appears to me, therefore, I confess, that upon the substance of the case the plaintiff is right, and I do not think that the question about the 812*l.* 10*s.* at all affects the case, because it is not a mere asking for money, but it is asking that the plaintiff may be placed in a specific character with respect to the Company, by having these scrip certificates allotted to him, with a certain understanding that the deposits are to be considered as having been paid.

Then there is an objection for want of parties; but in the first place it is charged by the bill that there are monies in the hands of the provisional committee, and there is no personal demand made against any shareholder. There is nothing more in effect asked, than that the debt should be paid which was incurred for the purpose of constituting the Company itself, and I cannot but think that if I do not attend to the allegation in the bill, that the shareholders in the Company are very numerous, and cannot, without the greatest inconvenience, be made parties to this suit, I shall be actually denying to the plaintiff the justice which is due to him in the plainest case. All that is asked is, only, that out of monies now in the hands of the provisional committee the plaintiff's demand shall be paid; and I think, that attending to that allegation, and to the relief sought by the bill, the demurrer must be overruled.

From this judgment the defendants appealed.

The case was argued by the same counsel as in the Court below.

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The LORD CHANCELLOR, [after remarking, that, in the course of the argument in support of the demurrer, important questions had been raised, but it was not then necessary for him to express any opinion concerning them], said:—It was argued in support of the demurrer that there was no allegation in the bill that the defendants were possessed of any unallotted shares whatever wherewith specifically to perform the agreement with the plaintiff. The statements in the bill were these: that the plaintiff received applications for shares from responsible persons to an amount exceeding the whole number required for raising the necessary capital of the Company. That the committee had made an allotment of shares to various persons, and they might, if they had thought proper, have made allotments of shares to responsible applicants to the extent of the whole amount of capital required for the Company; and the provisional committee, in fact, represented that they had allotted the whole of the said shares. The bill then set forth a copy of an advertisement published by the provisional committee, in which they gave notice that they had completed the allotment of shares. In the absence of any statement or charge in the bill, that this representation was false or incorrect, it must be taken to be the true meaning of the bill that all the shares had been allotted. The presumption is always against the pleader, because the plaintiff is presumed to state his own case in the manner most favourable to himself; if, therefore, he has left anything material to his case in doubt, the assumption must be in favour of the other party. How can the Court in such a case decree a specific performance? Are the defendants to be ordered to buy scrip, or to create fictitious scrip for the purpose? It has been said that the Master of the Rolls has in one case (a) refused to decree specific per-

(a) *Jackson v. Cocker*, Ante, Vol. 2, p. 368.

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formance of a contract for the sale of scrip; it is not necessary I should express any opinion on that point, for the bill does not contain sufficient allegation to raise it. For the reasons I have mentioned I think the demurrer ought to have been allowed. On the question of parties, it is not necessary for me to express any opinion.

Mr. *J. Parker* then applied for liberty to amend.

The LORD CHANCELLOR.—It is not a case for that, you must file another bill.

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IN THE HOUSE OF LORDS.

NORTH BRITISH RAILWAY COMPANY, *Appellants.*

N Tod - - - - Respondent. July 14th & 23rd.

It was an appeal from a judgment of the Court of Session in Scotland, whereby they had granted an interdict and injunction against the appellants, prohibiting them from crossing their railway through the approach or avenue of the respondent's house, excepting at a depth of fifteen feet or more inches from the then surface-level of his avenue, under a bridge not higher than two feet from the surface-level to the metalled surface of the roadway along such approach, with a gradient or descent of not more than one in twenty feet from the summit-level of the roadway on the approach towards the respondent's house; or at all events, at least not less than ten feet four inches from the surface-level of the said avenue, and under a bridge not higher than seven feet from the said surface-level to the metalled surface of the roadway along said bridge, with a gradient

The plaintiff was the owner of a house near a public road, and connected therewith by an avenue and a lodge. A railway company deposited plans, &c., whereby it was shewn that they intended to cross the plaintiff's avenue 520 feet from the lodge, under a bridge raising the level of the roadway of the avenue only two feet, and by means of a cutting fifteen feet in depth.

The plaintiff, relying on the

sections, did not oppose the bill in Parliament, which accordingly passed into an act. The Railway Company afterwards gave notice of their intention to deviate from the original plan to make their cuttings sixty-one feet nearer the plaintiff's house, and to make a cutting of his avenue seventeen feet high.

On appeal from the Court of Session in Scotland, an application by the plaintiff, for an interdict to prevent the Company from crossing the plaintiff's avenue in any other manner than that by the original plans, refused, notwithstanding it was shewn that the measurements on the original plans had been miscalculated with reference to the datum line, and that the plaintiff's cuttings would, according to those plans, exceed the vertical powers of deviations of the Railway Company.

That parties are bound by what is represented on the deposited plans and sections, so long as such plans and sections are incorporated in or specially referred to by the act.

The Court will not regard what is done under the Standing Orders of the House, but will look at the act itself.

The plans are binding to determine the level of the railway with reference to the datum line, not to the surface level of the land over or through which the railway passes.

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or descent of like inclination from the summit-level of the roadway on the bridge towards the house.

The facts of the case were as follow :—

The appellants, who, under an act (8 & 9 Vict. c. 144) had acquired a right to the Edinburgh and Hawick Railway, in the month of December, 1844, served a notice on the respondent, the proprietor of Kirkhill-house, setting forth that application was intended to be made to Parliament in the then ensuing session for an act to make and maintain the said railway; and that the property mentioned in the schedule annexed to the notice, or some part thereof, in which the respondent was interested, would be required for the purposes of the said undertaking, “according to the line thereof, as at present laid out, or may be required to be taken, under the usual powers of deviation, to the extent of 100 yards on either side of the said line, which will be applied for in the said act, and will be passed through in manner mentioned in such schedule.”

And by the said notice, intimation was further given to the respondent, that a plan and section of the undertaking, with a book of reference thereto, had been deposited at the offices of the sheriff-clerks; and that copies of so much thereof as related to the parish in which the respondent's property was situate, with a book of reference, would be deposited for public inspection, on or before the 31st day of the month of December; on which plan the respondent's property would be designated by the numbers set forth in the schedule annexed to the notice.

This schedule was intituled, “Schedule referred to in the foregoing notice, and which is intended to shew the property therein alluded to, and the manner in which the line of the deposited section will affect the same;” and in the column or compartment of the said schedule pointing out the manner in which the respondent's right and interest were to be affected, and headed, “Description of the section of the line deposited, and

the greatest height of embankment and depth of cutting,—the only words inserted were, “Cutting, 15 feet 4 inches—Bridge.”

By the Parliamentary plan deposited in the sheriff-clerk’s office, it was shewn that the line would pass through the respondent’s avenue about 520 feet from his lodge, which was adjacent to the turnpike-road. On the deposited section it was stated, that the cutting for the railway, where it was to be made through the avenue, would be fifteen feet four inches deep, and that the level of the roadway of the avenue at that place would be raised two feet by a bridge, under which the railway would be carried; and on the corresponding cross-section, the road to be formed along the bridge was represented as having an inclination of one foot in twenty, over a very short distance, from the summit-level of the approach to the railway in a direction towards the respondent’s house, which was at a considerably lower level than his lodge at the turnpike-road, and it followed that the nearer the line of the railway (which crossed the approach) could be kept to the level of the avenue, the deeper would be the cutting, and consequently the less the interference with the level of the approach.

The respondent was very averse to this projected railway being carried through his avenue at all, but relying upon the representations contained in the plan, sections, and notice of the manner in which the line would affect his property, was induced to abstain from opposing the appellants’ case in Parliament.

The trustees of the turnpike-road having taken objection to the line as laid down, it was found necessary to revise the plan, and they served a notice and plan on the respondent, whereby it appeared that the appellants intended to bring his avenue nearer to his house than was shewn on the original plan; and, instead of a cutting of fifteen feet four inches deep, a bridge two feet only above the level of the avenue, was now proposed to make a cutting of only two feet ten inches deep, and to raise an embankment, with a bridge for the

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respondent's use, seventeen and a half feet above the level of his avenue, with a steep descent on both sides towards the lodge and the house.

The Lord Ordinary, on the application of the respondent, granted an interim interdict; and on the 24th January and 12th February, 1846, remitted three points to an engineer, who, by his report, found, first, That the new plan served on the respondent was within the line of deviation as delineated on the Parliamentary plan; secondly, That the railway crossed the respondent's approach sixty-one and a half feet further down from the lodge, but that the plan itself, unless the sections and descriptions in the schedule were to be taken as part of it, did not differ in other respects from the Parliamentary plan; and thirdly, That the surface of the avenue, as deduced from the actual leveling, was six feet above the levels of the railway as referred to the datum line at the new point of intersection; and, consequently, the intended cutting being two feet ten inches in depth, there remained three feet two inches amount of deviation from the levels of the railway, as referred to the common datum line.

From this report it also appeared that the difference in the levels of the surface of the avenue at the original and new point of intersection was only one foot eleven inches; consequently, if the proposed line was within the limits of vertical deviation permitted by the act, there must have been, and it was admitted by the appellants that there was, an error in the original plan and sections served on the respondent.

On 31st July, 1845, the appellants obtained their special statute with which were incorporated the three General Railway Statutes for Scotland (*a*), and thereby they were empowered to make a railway from Dalhousie Mains to

(*a*) The Companies Clauses c. 17; The Lands Clauses Consolidation Act, 8 & 9 Vict. consolidation Act, Id. c. 19; The

Hawick. The 16th section of the special act was as follows:—"And whereas plans and sections of the railway, shewing the line and levels thereof, and also books of reference containing the names of the owners and lessees, and occupiers of the land through which the same is intended to pass, have been deposited with the sheriff-clerks of the counties of Edinburgh, Selkirk, and Roxburgh, be it enacted, that, subject to the provisions in this and the said recited acts contained, it shall be lawful for the said Company to make and maintain the said railway and works in the line and upon the lands delineated on the said plans, and described in the said books of reference, and to enter upon, take, and use such of the said lands as shall be necessary for such purpose."

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An interdict having been granted in the terms before stated, the railway Company obtained leave to appeal therefrom.

Mr. Stuart and *Mr. Bethell*, for the appellants. — The plan deposited with the sheriff-clerk of Mid-Lothian has delineated on it the line of the railway, and the datum line to which the line of the railway has reference; but, whatever the plan so deposited disclosed, was subject both to the lateral and vertical powers of deviation conferred by the general statutes on the Company. And the only question is, whether they are, by their proposed operations, exceeding the statutory powers of deviation?

Now, the plea of the respondent is, that the appellants are bound by the description in the schedule served on him in 1844, before the special act was applied for, and by the figures 15 ft. 4 in. mentioned in the cross-section of the Parliamentary plans. The first part of their prayer for interdict (which has been granted by the Court below) is, that if

Railway Clauses Consolidation Act, Id. c. 33. The clauses in these acts which bear upon the	question in this cause, are stated or sufficiently referred to in the argument and judgments.
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the original line of the railway, as delineated on the plan, be adhered to, it might intersect his approach in a cutting of fifteen feet four inches, though by so cutting the vertical deviation in the level of the railway, with reference to the datum line, should exceed five feet, and thereby subject the appellants to the risk of being stopped by the adjoining proprietor the instant the respondent's approach has been passed through.

But, in the first place, the appellants deny the existence of any covenant or obligation upon them, with reference to the formation of the railway through the respondent's approach, other than the provisions of the statutes. In the special act, though there are several covenants with reference to other roads and properties, there is none with reference to this occupation road of the respondent. And in the Court below, it was irregular to allow the schedule served upon the respondent before going to Parliament, to be introduced into the discussion as part and parcel of the acts of Parliament, or even as a means of interpreting their enactments: *Edinburgh and Dalkeith Railway Company v. Wauchope* (a).

In the second place, all that the statutes enjoin is, that, in exercising the power of deviating vertically, the deviation shall not exceed five feet from the levels of the railway, as referred to the common datum line described in the section approved of by Parliament, and as marked on the same. Neither in the special nor in the general acts is it provided that the undulating surface line of the ground is to be taken as the test of deviation. There is neither express enactment to that effect, nor can it be so held by any fair implication from the enactments. With a view to regulate the power of deviation, and determine its extent, it is clear that there must be some unalterable line, which can with certainty be ascertained, and may, under all circumstances, be referred to. So long as there is a lateral power

(a) Ante, Vol. 3, p. 232.

of deviation, reference to the undulating and varying level of the surface would be absurd and unsatisfactory. Accordingly, it is well known in practice, that the line of level adopted as the criterion for regulating the power of vertical deviation, is the line of the railway delineated on the Parliamentary plan, with reference to the datum line. The 11th section in the Railway Clauses Consolidation Act proceeds on this notion, and is so clearly expressed as not to admit of any other construction. The line of levels regulating the power of deviation, is the line of railway "as referred to the common datum line described in the section approved of by Parliament, and as marked on the same." And it is proved by Mr. B.'s report, that this line of railway so marked on the plan is correctly laid down with reference to the datum line. It is conceived, therefore, that this line must be taken as the only criterion for fixing the limits of the power of vertical deviation. And if this line be adopted, the line of railway, as proposed to be constructed, only deviates three feet two inches vertically from that line, being within the limits allowed by the clause of deviation.

The interdict has been granted on the notion, that the surface-level, and not the level of the line of railway, as ascertained with reference to the datum line, is to be assumed as the criterion for affixing the limits of vertical deviation; but this, it is submitted, is an erroneous view of the statutes, and makes the description in the Parliamentary notice served on the respondent control the express enactment in the 11th section of the Railway Clauses Consolidation Act.

It is obvious, that, by exercising the lateral power of deviation in localities where the declivity of the surface is great, instead of the railway crossing in a cutting, as described in the Parliamentary notice, and as delineated in figures on the plan, it may be on the surface-level, or even on a considerable embankment. An increased claim for compensation to the proprietor or occupier of the ground

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may arise in consequence of such deviation and its results; but it is a very different matter to say that the description in the Parliamentary notice, which is always subject to the statutory powers of deviation, or that the figures descriptive of the surface-level, or cutting from that level to the line of the railway, are absolute or binding when in the statute no enactment to this effect is to be found: *Blakemore v. The Glamorganshire Canal Company* (a).

Sir *F. Kelly* and Mr. *Rolt*, for the respondent.—The plans and sections deposited in pursuance of the Standing Orders must be considered important, and must control and regulate the line of the railway. By one of those orders (b), the section is directed to represent the surface of the ground marked on the plan, and the intended line of the proposed work. And it is also ordered, “that in every section in a railway, the line marked thereon shall correspond with the upper surface of the rails.” And it is further ordered (c), “that where a cutting is required, its extreme depth shall be marked on the section;” and that when an embankment is necessary, its extreme height shall be marked. That where any alteration in the present level of any road shall be intended, that alteration shall also be stated on the section; and, further, in order to explain the nature of such alterations more clearly, it is ordered, that, in addition to the principal section, a cross-section shall also be given in reference to the said numbers. The 11th section of the General Railway Act has two distinct sentences referring to, and connected with, the same subject-matter, viz. the levels of the railway. “It shall not be lawful to deviate from the levels of the railway—first, as referred to the common datum line described in the section approved of by Parliament; and, secondly, as marked on the same.” The words “as marked” must necessarily refer back to the levels of the railway, and the words “on the same”

(a) 1 My. & K. 154.

(b) 227. 4.

(c) 227. 6.

must refer to and mean, on the section approved of by Parliament. It cannot mean the levels marked on the datum line, for there are no levels marked on that line; neither can the words "as marked" refer to the datum line. The two clauses of the section then may be read separately. The second clause may be read thus:—"It shall not be lawful to deviate from the levels of the railway, as marked on the section approved of by Parliament." From this marking, the respondent clearly understood that the level of the railway was to be fifteen feet four inches below the point of intersection delineated on the Parliamentary plan. The first clause of the section in question relates to the height of the railway above the datum line, while the other clause relates to its height above, or its depth below, the surface. As the line of railway passes below the surface on the one hand, and above the datum line on the other, the statute refers it to both the one and the other, and the meaning of the two clauses taken together is this, that the railway shall not be elevated nearer the surface, or depressed nearer to the datum line, except to the extent of five feet. A reference to the datum line affords no information to a proprietor, while a reference to the surface satisfactorily does so. It is conceded by the respondent, that, under the 15th section of the General Act, the appellants have a power to deviate laterally; but the two powers, the one of lateral, and the other of vertical deviation, are altogether distinct from each other. The power to deviate laterally cannot possibly give or imply a power to deviate vertically, and the converse of this is equally clear. The level of the railway, with a cutting of thirteen feet five inches at the new point of intersection, ought to be the same height above the datum line, as it would have been with a cutting of fifteen feet four inches at the original point. That height has been shewn to be 360 feet five inches above the datum line. The 11th section of the statute gives a power to deviate

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vertically to the extent of five feet. If, therefore, the level of the railway at fifteen feet four inches below the surface at the original point of intersection, or at thirteen feet five inches below at the new point, would be 360 feet five inches above the datum line, the power to deviate vertically would enable the appellants to construct their railway five feet farther below the surface, or five feet nearer to it. The height of the railway would then be either 355 feet five inches or 365 feet five inches above the datum line. The appellants wish to raise the level of the railway. Consequently, the railway ought to be 365 feet five inches above the datum line; that is, at a level of ten feet four inches below the original point, or at a level of eight feet five inches below the new point of intersection. But the level which the appellants propose to adopt is only two feet ten inches below the new point of intersection, which corresponds to a level of four feet nine inches below the original point; that is, in both cases, at a height of 371 feet above the datum line, which is five feet seven inches more than is allowed by the statute.

The Parliamentary section forms a part of the contract between the appellants and the public. It contains the representation which they made to Parliament before obtaining their bill; relying upon which the respondent was induced to abstain from opposing them in Parliament; and on that representation their bill was granted. Can they be suffered to turn round now, and say that all the representations made to Parliament and the respondent were false, and, being false, that they are no longer bound by them?

An express statute was passed by the Legislature with regard to depositing the plans and sections required by the Standing Orders of both Houses of Parliament (*a*).

(*a*) 7 Will. 4 & 1 Vict. c. 83.
 The preamble is in these terms:
 —“Whereas the Houses of Par-

liament are in the habit of requiring, that, previous to the introduction of any bill into Parlia-

General Railway Statute constantly refers to the statutory plan and sections, and the clauses of that

making certain bridges, roads, cuts, canals, reeducts, water-works, tunnels, archways, vias, ports, harbours, docks, and other works, under the authority of the Statute, certain maps or sections, and books and extracts or copies of certain maps, plans or books and writings, shall be deposited in the office of the clerk of the peace for every county or division, in England or in the office of the clerk of every county in Scotland, in which such work is to be made, and also the parish-clerk of every parish in England, the school-master of every parish in Scotland, royal burghs with the clerk, and the post-master of every town in or nearest to Dublin in Ireland, in which such work is intended to be made, and of other persons; and it is expedient that the said maps, plans, sections, books, and copies or extracts, and the same, should be deposited with the said clerks of the peace, clerk-clerks, parish-clerks, school-masters, town-clerks, post-masters, and other persons, and shall remain in their custody and possession hereinafter men-

That whenever either the House of Commons or the House of Lords of Parliament shall, by any Act, or by any order, already made, or hereafter to be made,

require that any such maps, plans, sections, books, or writings, or extracts or copies of the same, or any of them, shall be deposited as aforesaid, such maps, plans, sections, books, writings, copies, and extracts shall be received by, and shall remain with the clerk of the peace, sheriff-clerks, parish-clerks, schoolmasters, town-clerks, post-masters, and other persons with whom the same shall be directed by such standing orders to be deposited; and they are hereby respectively directed to receive and to retain the custody of all such documents and writings so directed to be deposited with them respectively, in the manner and for the purposes, and under the rules and regulations concerning the same, respectively directed by such standing orders, and shall make such memorials and indorsements on, and give such acknowledgments and receipts in respect of the same respectively, as shall be thereby directed."

Sect. 2. "That all persons interested shall have liberty to, and the said clerks of the peace, sheriff-clerks, parish-clerks, schoolmasters, town-clerks, and post-masters, and every of them, are, and is hereby required, at all reasonable hours of the day, to permit all persons interested to inspect during a reasonable time, and make extracts from, or copies of, the said maps, plans, sections, books, writings, extracts, and copies of or from the same, so

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statute are incorporated in the special act, which also refers distinctly to the Parliamentary plan and sections of the railway (*a*).

The 16th section of the special act states, that "whereas plans and sections of the railway, shewing the line and levels thereof, have been deposited, it shall be lawful to make and maintain the said railway and works, in the line and upon the lands delineated on the said plans." There is no power here given to deviate from the levels of the railway, which are stated to be shewn on the sections deposited. It is the 11th section of the General Railway Act, therefore, which confers that power (*b*).

The result of the review of the 7th, 8th, 9th, 12th, 13th, and 14th sections (*c*) of the general statute tends to establish

deposited with them respectively, on payment by each person to the clerk of the peace, sheriff-clerk, clerk of the parish, school-master, town-clerk, or postmaster, having the custody of any such map, plan, section, book, writing, extract, or copy, one shilling for every such inspection; and the further sum of one shilling for every hour during which such inspection shall continue after the first hour, and after the rate of sixpence for every one hundred words copied therefrom."

(*a*) Ante, p. 453.

(*b*) Sect. 11. "That in making the railway it shall not be lawful for the Company to deviate from the levels of the railway as referred to the common datum line described in the section approved of by Parliament, and as marked in the same, to any extent exceeding in any place five feet, or, in passing through a town, village, street, or land, con-

tinuously built upon, two feet, without the previous consent in writing of the owners, and occupiers of the land in which such deviation is intended to be made: Provided always, that it shall be lawful for the Company to deviate from the said levels to a farther extent, without such consent as aforesaid, by lowering solid embankments or viaducts, provided that the requisite height of headway so prescribed by act of Parliament be left for roads, streets, or canals passing under the same."

(*c*) Sect. 7. "If any omission, mis-statement, or erroneous description shall have been made of any lands, or of the owners, lessees, or occupiers of any lands described on the plans or books of reference mentioned in the special act, or in the schedule to the special act, it shall be lawful for the Company, after giving ten days' notice to the owners of the

Parliamentary plans and sections must be held as part of the Parliamentary bargain or contract be-

ected by such proposed
1, to apply to the sheriff
rection thereof; and if
appear to such sheriff
h omission, mis-state-
erroneous description,
n mistake, he shall cer-
same accordingly; and
uch certificate state the
rs of any such omission,
what respect any such
all have been mis-stated
eously described; and
ificate shall be deposited
ice of the principal she-
, in every county in
e lands affected thereby
ituate, and shall also be
with the schoolmasters
veral parishes (or, in
rghs, with the town-
which the lands affected
hall be situate; and such
shall be kept by such
rk, schoolmasters, and
sons respectively, along
a other documents to
ey relate; and, there-
h plan, book of reference
le, shall be deemed to
ted according to such
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Company to make the
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. "It shall not be law-
e Company to proceed
ecution of the railway,
y shall have, previously
ommencement of such
posited in the office of
pal sheriff-clerk in every
or through which the

railway is intended to pass, a plan
or section of all such alterations
from the original plan and section
as shall have been approved of by
Parliament, on the same scale,
and containing the same par-
ticulars, as the original plan and
section of the railway; and shall,
also, have deposited with the
schoolmasters of the several par-
ishes (or, in royal burghs, with
the town-clerk) in or through
which such alterations shall have
been authorised to be made, copies
or extracts of or from such plans
and sections as shall relate to such
parishes respectively."

Sect. 9. "The said sheriff-
clerk, schoolmasters, and town-
clerks, shall receive the said plans
and sections of alterations, and
copies and extracts thereof re-
spectively, and shall retain the
same, as well as the said original
plans and sections, and shall per-
mit all persons interested to in-
spect any of the documents afore-
said, and to make copies and
extracts of and from the same, in
the like manner, and upon the
like terms, and under the like
penalty for default, as is provided
in the case of the original plans
and sections, by an act passed in
the first year of the reign of her
present Majesty, intituled 'An
Act to compel Clerks of the Peace
for Counties, and other Persons, to
take the custody of such Docu-
ments as shall be directed to be
deposited with them under the
Standing Orders of either House
of Parliament.' "

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tween the appellants and the public : *Shand v. Henderson* (a),
Blakemore v. The Glamorganshire Canal Company (b), *Webb*

Sect. 12. "Before it shall be lawful for the Company to make any greater deviation from the level than five feet, or, in any town, village, street, or land continuously built upon, two feet, after having obtained such consent as aforesaid, it shall be incumbent upon the Company to give notice of such intended deviation by public advertisement, inserted once, at least, in two newspapers, or twice, at least, in one newspaper, circulating in the district or neighbourhood where such deviation is intended to be made, three weeks, at least, before commencing to make such deviation; and it shall be lawful for the owner of any lands prejudicially affected thereby, at any time before the commencement of the making of such deviation, to apply to the Board of Trade, after giving ten days' notice to the Company, to decide whether, having regard to the interests of such applicant, such proposed deviation is proper to be made; and it shall be lawful for the Board of Trade, if they think fit, to decide such question accordingly, and by their certificate, in writing, either to disallow the making of such deviation, or to authorise the making thereof, either simply, or with any such modification as shall seem proper to the Board of Trade; and, after any such certificate shall have

been given by the Board of Trade, it shall not be lawful for the Company to make such deviation, except in conformity with such certificate."

Sect. 13. "Where, in any place, it is intended to carry the railway on an arch or arches, or other viaduct, as marked on the said plan or section, the same shall be made accordingly; and where a tunnel is marked on the said plan or section as intended to be made at any place, the same shall be made accordingly, unless the owners, lessees, and occupiers of the land in which such tunnel is intended to be made, shall consent that the same shall not be so made."

Sect. 14. "It shall not be lawful for the Company to deviate from, or alter the gradients, curves, tunnels, or other engineering works described in the said plan or section, except within the following limits, and under the following conditions, (that is to say), subject to the above provisions in regard to altering levels, it shall be lawful for the Company to diminish the inclination or gradients of the railway to any extent, and to increase the said inclination or gradients as follows—(that is to say) in gradients of an inclination not exceeding one in a hundred, to any extent not exceeding ten feet per mile, or to any further extent

(a) 2 Dow's Appeal Ca., p. 519.

(b) 1 My. & K. 162, 163.

v. The Manchester and Leeds Railway Company (a), Stowbridge Canal Company v. Wheelley (b).

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By the terms of the 14th section, the object of the Legislature is to protect as much as possible the rights of private parties. The alterations allowed to be made, if authorised by the Board of Trade, are to the advantage, and not to the injury, of proprietors. If authorised by the Board of Trade, the Company may make a tunnel, not marked on the Parliamentary plan or section, instead of a cutting, or a viaduct instead of a solid embankment. The converse of such a power, however, is not given. But it is to be observed that, within certain specified limits, it is not lawful for the Company to deviate from or alter the gradients, curves, &c. A cutting of fifteen feet four inches is an engineering work; so also is the construction of a bridge; so also is the alteration of the level of an approach; and if described in the Parliamentary plan or section, the appellants have no power to deviate from or alter them, except within the limits specified.

THE LORD CHANCELLOR.—This is a case of very great importance as affecting the rights of the parties. The first question to be considered is, what is the rule in respect to

which shall be certified by the Board of Trade to be consistent with the public safety, and not prejudicial to the public interest; and in gradients exceeding the inclination of one in a hundred, to any extent not exceeding three feet per mile, or to any further extent which shall be so certified by the Board of Trade as aforesaid. It shall be lawful for the Company to diminish the radius of any curve described in the said plan to any extent which shall

leave a radius of not less than half a mile, or to any farther extent authorised by such certificate as aforesaid from the Board of Trade. It shall be lawful for the Company to make a tunnel, not marked in the said plan or section, instead of a cutting, or a viaduct instead of a solid embankment, if authorised by such certificate as aforesaid from the Board of Trade."

(a) 4 My. & Cr. 120.

(b) 2 B. & Ad. p. 793.

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applications for interdicts in Scotland, or for injunctions in England, as applicable to cases of this kind? The case on the part of the respondent being, that a plan was exhibited to him and to the public previous to the passing of the act under which the Railway in question was intended to be made, which plan represented that the Railway would pass over his land in a cutting of something more than fifteen feet from the surface. The respondent alleges, that, giving faith to these representations, he had, as he naturally might, come to the conclusion as to what course he was to pursue with reference to the supposed state of circumstances as represented upon that plan; and that now the Railway Company have not only deviated, which they had a right to do, by another line within the prescribed distance, which is 100 yards, but they also propose to deviate beyond five feet vertically, which is the limit of the vertical deviation imposed by the act of Parliament, that is, they propose to come nearer the surface by a space exceeding five feet. The Railway Company say, that they do not dispute that they are actually coming nearer the surface to a much greater extent than the five feet, but they say they are still within the prescribed deviation from the datum line as laid down for the formation of the Railway, the datum line being an imaginary line, taking its commencement from some given point at a certain elevation, and then that line is supposed to run in a perfectly horizontal direction, and the inclination of the Railway is measured with reference to that datum line. They say they are within the distance, that is, within the five feet of the line laid down upon those plans measured with reference to the datum line, and they contend, therefore, that they are within the provisions of the act of Parliament, and that they are not deviating beyond what that act authorises. Now, as to the effect of plans exhibited previous to the contract being made, or previous to the act of Parliament being obtained, it does seem, from cases which have occurred, both in Scotland and

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country, that the rule of the courts in the one country in the other is no longer a matter of any doubt or . If a contract, or an act of Parliament, refer to a the extent that the act refers to the plan, and for pose for which the act or contract refers to the plan, tedly it is part of the contract or part of the act. that there is no dispute. A contract, or an act of ment, either does not refer to a plan at all, or it refers r a particular purpose. It has been contended, both land and in England, that the defendant in the suit, e who claim the benefit of the provisions of an act iament previous to the enactment being made, or the t being concluded, have represented that the works e carried on in a particular mode, upon a plan shewn s to the powers being obtained under the act, or the t being concluded, and that the party obtaining the obtaining the contract, is bound by such represent-

There was a case very much considered in Scotland the case of *The Feoffees of Heriot's Hospital v. Gibson* (a); several cases have occurred in the courts of equity in country. It was my fortune to have to consider the very minutely in the case of *Squire v. Campbell* (b), in I thought it my duty to review all the cases that had d in the one country and in the other, for the pur- f possible, of establishing a rule which might be a on future occasions where similar cases should occur; ound, that, certainly, what had been very much the of the profession in this country, viz. that the par- re bound by the exhibition of such plans, had met very wholesome correction by the doctrine laid down d *Eldon* and Lord *Redesdale* in the case of *Heriot's al*, a case coming from the Court of Session, and l by this House. Under the authority of that case, sh the point was very distinctly raised and deliber- decided upon by those two very learned Lords, I o the conclusion that there was no ground for equit-

(a) 2 Dowl. 301.

(b) 1 My. & Cr. 459.

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able interposition. Now, my Lords, not relying upon the authority of *Squire v. Campbell*, but relying, as we are bound to do, upon the case of the Feoffees of Heriot's Hospital, which was a decision of this House, I consider that to be the rule to which the courts of this country, and the Courts of Session in Scotland, and this House, must hereafter adhere. Taking that, then, to be the rule in examining the facts of this case, and the act of Parliament upon which the question turns, we are not to look at what was represented upon the plan, except so far as its representation is incorporated in, and made part of, the act of Parliament; and the real question therefore turns upon this, whether the acts of Parliament do or do not make the datum line, and line of Railway with reference to that datum line, the subject-matter of these enactments, and the rule by which the rights of the parties are to be regulated, or whether it also includes the surfaces which, in this instance, accidentally, no doubt, had been very much misrepresented upon the plan. We are first of all, then, to refer to the act of Parliament under which this Railway is to be carried into effect, and the enactment is in the 16th section. I may here observe, before I refer to that section, that everything which is out of the act is to be found in the standing orders of the one house or the other; but the plans which are required to be exhibited by those standing orders, except so far as they are made part of this act, are, as I apprehend, entirely out of the question, for although it may be very convenient that standing orders of this or of the other House should require plans to be exhibited containing matters which are not binding between the parties, still, when we are looking to what the rights of the parties are, we can only look to the act of Parliament by which those rights are regulated. Plans or proceedings previous to the enactment can have no effect upon the enactments themselves. [His Lordship then read the 16th section of the special act (a).] There is a parliamentary authority, which

(a) See ante, p. 453.

of course cannot be disputed, that the parties are to be at liberty to make "the railway and works on the line, and upon the lands delineated in the said plans." We have, therefore, only to look at what is the meaning of the word "line," as used in this act of Parliament. The reciting part of that section speaks of "lines" and "levels." It is therefore necessary to look to other acts—the general acts being required to be incorporated and made part of this act—to see what is the meaning of those terms used in this section; because this is a power under which the Railway Company are to act, and if they bring themselves within the meaning of the enactment, explained by provisions and sections to be found in other acts of Parliament, beyond all doubt they are then exercising the powers which the Legislature intended to vest in them. In the Railway Clauses Consolidation Act for Scotland, (7 & 8 Vict. c. 33,) we have several sections to which it appears to me to be necessary to refer; to the 7th and 8th I only refer for the purpose of observing that the plans which are therein referred to, are in cases where, after the original plans have been deposited, it has been found that they contain certain errors, and then it defines the means by which the parties are to correct those errors and to make their plans correct. But the 11th section contains this provision—"In making the railway it shall not be lawful for the Company to deviate from the levels of the railway as referred to the common datum line, described in the section approved of by Parliament and as marked on the same, to any extent exceeding, in any place, five feet, without the previous consent, in writing, of the owners and occupiers," &c. It then provides for the case of passing through a town, as to which other provisions are introduced. The description therefore of the levels, when it speaks of the levels of a railway, is in very distinct terms. It describes the level of the railway as referring to the common datum line described in the sections approved of by Parliament.

There are other clauses, to which I need not particularly

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refer. The 15th provides for a lateral deviation, which is not in question in the present case. The power which is given by that section has been acted upon, and it is not contended that the lateral deviation does exceed that power. Then come the enactments of the 16th section, "That subject to the provisions in this and the said recited acts contained, it shall be lawful for the said Company to make and maintain the said railway and works in the line, and upon the lands delineated in the said plans." And then it goes on to enumerate the works which the Company are to be authorised to make. Now, taking those enactments—because I do not find that the other acts contain any provisions which are very material to be attended to—taking those two enactments together, it appears to me to be quite plain that the Legislature intended, in speaking of lines, and in speaking of levels of the intended railway, to confine those provisions and to refer them to the datum line, and not to any other representation. Although great convenience may arise from the plans and sections required by the standing orders to be exhibited previous to the application to Parliament for powers to make the railway, representing the surface as well as the datum line, and the intended line with reference to that datum line, yet if any difficulty should arise as to the construction to be put upon the section to which I have referred, we must recollect that Parliament must be supposed to have had before it not only the line, as explained in these sections, but also the other surface line which is exhibited in the plan. But the enactment totally disregards the surface line, and confines it in terms to the datum line,—to the line of railway to be measured and ascertained with reference to its distance from that datum line.

I say then, my Lords, that a case does arise upon these provisions of the acts, in which the plan, indeed, is referred to, but is, in the terms of the act of Parliament, referred to only for the purpose of ascertaining the line of the railway with reference to the datum line. It is not re-

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ferred to with reference to any surface level. The plan, therefore, is entirely out of the enactment, and is not to be looked at for the purpose of construing the enactment as to any part of it, except so far as it is referred to and incorporated in the act. Arriving at that construction of the rule upon the provisions of the two acts to which I have referred, and applying it to the principle which has been established in Scotland, and by this House in the case of the Feoffees of Heriot's Hospital, cited in the Court of Chancery in the case of *Squire v. Campbell* (a), we have no difficulty in coming to the conclusion, that the application of that principle will necessarily lead to the construction of the clauses to which I have referred. The plan is binding to the extent of determining the datum line, and the line of railway measured with reference to that datum line; but not with reference to the surface levels of the land, because the act does not apply it for that purpose, but cautiously confines the enactment to the other plans to which I have already referred.

Acting, therefore, upon the principle so established, and with reference to the construction, or what I conceive to be the construction to be put upon these sections, although we cannot but greatly lament the hardship which, in all probability, these circumstances have imposed upon the respondent, in having his land interfered with in a manner which he did not at all anticipate, yet, when we are called upon to consider whether the Court of Sessions is correct or not, in suspending the further acts of the Company, with reference to the mode in which they were to pass his land, we are bound to look to see what are the powers which these acts vest in the Company; and according to the opinion which I have formed, and for the reason I have already explained, I come to the conclusion that the Company have not exceeded those powers, and do not propose to exceed those powers in the plans that they have

(a) 1 My. & Cr. 459.

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formed, and therefore that the Court of Sessions has been in error in granting the interdict against this Company.

LORD CAMPBELL.—I must admit that in this case I felt very considerable doubt as the argument proceeded, and I acknowledge that I come to the conclusion at which I have arrived, with very great reluctance. It seems to me to be a case of very great hardship upon Mr. Tod, who, looking to the plans lodged under the standing orders of the House of Commons, and also of this House, had every reason to believe that there was no danger of the railroad passing his approach in a manner that could seriously affect the convenience or amenity of his place of residence, and he might very reasonably abstain from offering any opposition to the bill before Parliament upon the faith of that representation. But when we come to consider what the law upon the subject is, I feel bound to concur in the opinion which has been expressed by my noble and learned friend. The first question, as it seems to me, to be considered is this, What is the legal construction of the act of Parliament? Does the Company, or does it not, propose to exceed the powers which the acts of Parliament confer upon it? Now it is admitted, that, if the deviation is to be calculated from the datum line alone, they (the Company) do not propose, either vertically or laterally, to exceed the powers of deviation which are conferred upon them by the acts of Parliament. Well, then, that raises the question whether those powers of deviation are to be calculated from the datum line alone, or whether the surface level is to be taken into consideration?—and my opinion is, (and I have no doubt at all about this—I never had much doubt about it), that the act of Parliament does refer everything to the datum line. I think it is evident that the 11th section of the 8 & 9 Vict. c. 33, clearly makes the datum line alone that which is to be regarded. The word “levels” in the plural number, really does not, in my opinion, at all include the surface levels. It means merely the levels of the datum line, which point out

the course the railway is to go. If that be so, the Company do not purpose to do anything that they are not authorised to do according to the letter of the act of Parliament.

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There certainly was a representation made here on the part of the Company, when they proposed to bring in an act of Parliament, by which they intimated that, at that time, the intention was that the railway should be fifteen feet four inches below the surface of Mr. Tod's property at the point of intersection—and that the bridge by which his approach should pass over the railway, would not be more than three feet. But this was entirely an intimation on the part of the Company that such was their intention. An act of Parliament of this sort has, by Lord Eldon and by all other judges who have considered the subject, been considered as a contract. Well, then, what took place was a negotiation, it was not a contract. We must regard it, and we must look to see what the contract was. The contract is to be gathered from the words of the act of Parliament; and that brings us to the question that I first considered—What is the construction of the act of Parliament? That act of Parliament must be considered as annulling and doing away with everything that had taken place prior to the time when the act of Parliament passed, and renders the representation or proposal of the Company, notwithstanding the act of Parliament, of no avail. Many cases have occurred in the Courts of common law in which it has been held that everything that takes place before a written contract is signed by the parties, is entirely to be disregarded in construing the contract by which they are bound. Now, if Mr. Tod had been cautious, he would have done what I would strongly recommend to all gentlemen hereafter to do under similar circumstances, which is, have a special clause introduced into the act of Parliament to protect their rights. I do not believe there is any committee, either in the House of Commons or in the House

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of Lords, who, if he had asked for a clause providing that the railroad should be of the depth of fifteen feet four inches, (with a power of vertical deviation, perhaps), in crossing his approach, and that he should be able to pass it by a bridge not more than three feet in height, would not have acceded to such a clause as a matter of course; for it is only reasonable that the respondent's property should be protected in this manner, and that he should be saved from such a deformity being erected in the sight of his dwelling-house, which would, for all time to come, be a great nuisance thereto, and might diminish its value. But he abstained from introducing any such clause, and therefore he must be considered as having acceded to the Company's having all the powers which the act of Parliament confers upon them. The act of Parliament confers on them the powers of deviating 100 yards laterally and five feet vertically, without any qualifications whatever. The Company do not purpose to deviate to a greater extent, they are therefore within the powers, that is, they are not exceeding the powers which are conferred upon them; they are acting according to the contract that must be supposed to have been entered into by them with Mr. Tod. I have read with great attention the case of the Feoffees of Heriot's Hospital (a), and also the admirable judgment of the lower Court in *Squire v. Campbell* (b), in which all the cases upon the subject are reviewed; and these cases remove all doubt from my mind, and induce me now, I may say, without hesitation—although, I again repeat, with very great reluctance—to come to the conclusion, that neither upon the construction of the act of Parliament, nor upon the ground of the representation that was made, is there any sufficient reason for supporting this interdict. I therefore agree in the judgment which has been expressed by my noble and learned friend.

It was then ordered that the interlocutors be reversed, and the cause remitted to the Court below.

(a) 2 Dow, 301.

(b) 1 My. & Cr. 459.

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BEFORE VICE CHANCELLOR WIGRAM.

THE GREAT WESTERN RAILWAY COMPANY v. CRIPPS.

25th July.

THIS was an *ex-parte* application for an injunction to restrain certain of the defendants from taking steps to withdraw a sum of money from the custody of the Court.

The circumstances of this case were as follow :—

The Great Western Railway Company had entered into a contract with certain persons of the name of Oldham, who had since become bankrupts, for the execution of certain works upon their railway ; and, in respect of this contract, became indebted in the sum of £4000.

The assignees of the bankrupts, and also a defendant of the name of Cripps, set up opposing claims to this sum, and in the meanwhile the assignees commenced an action against the Company, in order to compel the payment of it to them.

The defendants, the Company, paid the sum of £4000 into Court, whereupon the assignees took steps to stay the action, and to withdraw the sum so paid in, from the Court.

This was an application *ex parte* for an injunction to restrain the defendants, the assignees of the bankrupts, from procuring payment of the money out of Court, until they had established their claim to it.

Mr. Romilly and Mr. Osborne, in support of the application, insisted that the payment into Court had been made by the Company by inadvertence ; and that such payment

The assignees of A., and B. (a creditor of A.) made opposing claims to a sum of money due from a Railway Company for work done by A. The assignees having brought an action against the Company to recover it, the Railway Company paid the sum due by them into Court. The assignees proceeded to stay their action with a view to obtain the payment to themselves of the sum in Court ; whereupon the Company filed a bill in equity, and applied for an injunction :—*Held*, that this was not a case for the interference of a Court of equity.

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was not intended by them as an admission of the right of the defendants, the assignees, to the money, but only an admission of debt by themselves; that, if the claim of the defendant Cripps were established, the Company might be compelled to pay the debt twice over.

The VICE-CHANCELLOR.—If the payment of the money into Court by the Company gives the plaintiffs at law the right of taking the money out of Court, I do not see there is any equity to restrain them. The facts of the case were well known to the Company; and although they may have made the payment in ignorance of the legal consequences, it does not appear to me to amount to such a mistake as calls for the interference of a Court of equity.

[Leave was given to renew the application after notice to the defendants; but the plaintiffs did not avail themselves of the permission.]



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CAMPBELL and Others v. THE LONDON AND BRIGHTON RAILWAY COMPANY and R. HILL and E. CROWLEY.

29th July, &
3rd & 11th
Nov.

THE bill was filed by the plaintiffs, on behalf of themselves and all other holders of loan notes of the London and Brighton Railway Company, to whom shares had not been issued in respect of those notes; and it stated that the sums which the London and Brighton Railway Company were by their act (7 Will. 4 & 1 Vict. c. cxix) authorised to raise, being insufficient for the execution of their works, at a half-yearly meeting of the Company, held on the 20th of January, 1842, it was resolved, "That the directors be empowered to raise a sum not exceeding £300,000, by an issue of loan notes under the seal of the Company, payable at the end of five years, bearing interest in the meantime at the rate of £5 per cent. per annum, with an option to the holders of such notes to convert them, at the expiration of not more than three years, into one quarter shares of this Company at £10 per one quarter share, under the powers of an act to be obtained for that purpose, for which application will be made to Parliament at the earliest possible period. The present shareholders to

By a resolution of the London and Brighton Railway Company, the directors were empowered to raise £300,000 by an issue of loan notes, payable at the end of five years, bearing interest in the meantime, with an option to the holders to convert them, at the expiration of not more than three years, into quarter shares, under an act to be obtained for that purpose. The directors published an advertisement to the above effect, and thereby fixed the 10th February, the 15th

April, and the 15th July, for payment of the instalments of the sums allotted, and interest was to commence from time of payments. On payment of the whole sum, the Company delivered to the payer a loan note, whereby they promised to pay the bearer £100, and interest half-yearly on the 15th August and 15th February; and on this note was an indorsement, stating that an application was intended to be made to Parliament for an act, under the terms of which the bearer would be entitled on 15th February, 1845, provided previous notice should be given, to convert his loan note into quarter shares of the Company.

An act was obtained, and thereby the directors were empowered, by an order of a general meeting, to raise sums sufficient to pay off money borrowed, the sums raised to be divided into distinct shares, and to be appropriated as by the order of such meeting should be determined. At a general meeting the shares authorised by the act were ordered to be raised and allotted among the holders of loan notes, in the manner and on the terms directed by the act.

The plaintiffs did not declare their option until June, 1845; but, nevertheless, claimed to have shares allotted to them in exchange for their loan notes, and, on the Company refusing, filed their bill:—*Held*, that the original contract between the parties was not varied by the subsequent act and resolution.

That the plaintiffs, not having protested against the indorsement, nor given notice of their desire to convert their loan notes into shares until the day for declaring that option had passed, were not entitled to have shares allotted to them in exchange for their loan notes. Bill dismissed, with costs.

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have the preference of tendering for such loan notes, and such tenders to be made on or before the 10th of February, when the allotment will take place; one half of the amount tendered to be then paid. One quarter of the amount tendered to be paid on or before the 15th of April, and the remaining quarter on or before the 15th of July next, and interest to commence from the time of the respective payments,—it being distinctly understood, that the directors are never to call for the remaining £5 on the shares of the company, provided the above sum of £300,000 be raised by the means proposed.”

That, in consequence of such resolution, the solicitors of the Company caused to be published on the 21st of January the following advertisement:—

“ LONDON AND BRIGHTON RAILWAY COMPANY.

“Tender for Loans.—The directors of this Company are prepared, pursuant to a resolution passed at a special and general meeting of their proprietors, held at the London Tavern the 20th January instant, empowering them to raise £300,000 in loan notes under the common seal of the Company, payable at the end of five years, bearing interest in the meantime at £5 per cent. per annum, payable half-yearly, with an option to the holders of such notes to convert them, at the expiration of three years, into quarter shares of the Company, at £10 per quarter, under the powers of an act to be obtained for that purpose, for which application will be made to Parliament at the earliest possible period, and in the allotment of which notes the proprietors are to have the preference to make tenders for loans. The tenders are to express the sum proposed to be lent, to be addressed to the board of directors at &c., and to be sent in on or before the 10th of February, one half the amount to be paid on the allotment, one quarter on the 15th April next, and the remainder on the 15th July next, and interest is to commence from the time of the respective payments. By order,” &c.

That, during the interval between the 20th of January and the middle of February, 1842, plaintiffs made tenders to lend and advance to the Company certain sums of money on the terms mentioned in the resolution, which offers were accepted by the Company (a); and the plaintiffs paid the sums which the Company had agreed to borrow in the instalments mentioned in the resolution.

That, on the last instalment being paid, the Company caused a loan note to be delivered to the plaintiffs under the

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(a) *The Form of Tender.*

TO THE DIRECTORS OF THE LONDON
AND BRIGHTON RAILWAY COMPANY.

Gentlemen,—I request you will allot me loan notes to the amount of £—, under the common seal of the above-named Company, pursuant to and upon the terms and conditions of a resolution framed at a general and special meeting of proprietors held at the London Tavern, Bishopsgate-street, on the 20th of January instant; and I agree to take such loan notes and to such an amount as may be allotted to me, and to pay the instalments thereon at the times mentioned in such resolution.

I am, &c.

Signature ———.

Address ———.

Date ———.

The Form of Allotment Letter.

Sir,—The directors of the Company having accepted of your offer of a loan to the amount of £—, I am instructed to request that you will pay that sum to either of the under-mentioned bankers:

London: { Messrs. Smith, Payne,
& Smith.
Messrs. Glyn, Hali-
fax & Co.

Liverpool { Manchester and
Manchester { Liverpool District
Banks,

On account of Messrs.
Smith, Payne, & Smith,

by the following instalments, viz. £— on the 15th February, £— on the 15th April, and £— on the 15th of July next; or, at your option, the whole sum may be paid in the first instance. Each instalment is to bear interest at £5 per cent. per annum from the day of payment, and a loan note, under the seal of the Company, will be given in exchange for the bankers' receipts upon payment of the last instalment, or immediately if the whole sum be paid at once. If the second and third instalments be not paid within three days of the dates above specified, the loan as made or the sum paid will be considered as definitive for the term of five years, with interest at £5 per cent. per annum, and the option of taking shares in lieu thereof rendered null and void.

[Signed, &c.]

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common seal of the Company, which note was in the words and figures following:—

“LONDON AND BRIGHTON RAILWAY COMPANY, No. —

“£100.—On the 15th of February, 1847, the London and Brighton Railway Company promise to pay the bearer hereof, at Messrs. Smith, Payne, & Smith’s, Lombard-street, one hundred pounds for value received; and that, till the said sum becomes payable, interest shall be paid half-yearly at the respective dates of 15th August and 15th February, as witness their corporate seal. Sealed, by order of the board of directors, CHAS. R. MACKENZIE, (Sec).”

On this note was an indorsement, stating the days on which the interest would be payable, and also the following words:—

“In pursuance of a resolution of the general meeting held at the London Tavern, Bishopsgate-street, London, on the 20th January, 1842, application is intended to be made to Parliament for an act, under the terms of which the bearer will be entitled on the 18th February, 1845, providing previous notice be given, to convert his loan note into quarter shares of this Company at £10 each.”

That the Company, between January and the end of February, agreed to borrow from divers other persons, on the terms mentioned in the resolution of the 20th of January, 1842, divers other sums (amounting in all to £300,000), which sums were paid at various times between February and the 16th of July, 1842; and the Company delivered to the persons who advanced the sums loan notes in the form aforesaid.

That, on the payment of an instalment, the Company issued scrip receipts for such instalment.

That, in the year 1843, the Company obtained an act (6 & 7 Vict. c. xxvii), intituled—“An act to enable the

London and Brighton Railway Company to raise a further sum of money, and for altering and amending the Act relating to such Railway," whereby it was (amongst other things) enacted, That it should be lawful for the said Company, by order, from time to time, of any general or special general meeting, to raise by contribution among themselves, or by the admission of other persons as subscribers to the said undertaking, or in part by each of those means, such sum or sums of money as should be sufficient for paying off and discharging the whole or any part of any monies which they might have borrowed by virtue of that or the therein recited act from time to time; and that the money, so thereby authorised to be raised from time to time by subscription, should be divided into distinct and integral shares, and should be appropriated and disposed of in such manner, and by such ways and means, as by the order of any such meeting should be determined; and that all provisions thereinbefore contained or referred to with regard to the money thereinbefore authorised to be raised by such subscription, and to the shares to be issued in respect thereof, and to the holders of such shares, should apply to the said shares so to be raised as last aforesaid.

That, except by obtaining the said act of Parliament, the Company did not, until the year 1845, adopt any proceedings for carrying into effect the agreement of the Company; and that the act did not fix any time for the conversion or exchange of the shares.

That, on the 9th January, 1845, a special general meeting of the Company was held, pursuant to public notice; which notice stated that such meeting was to be held (amongst other purposes) for the purpose of considering and determining as to the raising money, and the mode and manner of issuing shares in pursuance of the act in connexion with the resolution of the 20th January, 1842.

That the resolution come to by the proprietors at this

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meeting, so far as regarded the issue of the new shares, was as follows:—

“That the shares authorised under and by virtue of the act of the 6 & 7 Vict. c. xxvii, be, and the same are, hereby ordered to be raised and allotted, to and amongst the owners of loan notes, in the manner, and upon the terms directed by such act, with liberty, however, to the owners of such loan notes to accept integral shares of £50, in lieu of quarter shares of 12*l.* 10*s.* as originally proposed.”

That, pursuant to the resolutions and agreements, the directors issued to several of the holders of notes, shares after the rate of one share for every £40, and delivered them certificates.

And the bill, after charging, among other things, that defendants R. Hill and E. Crowley (the chairman and deputy-chairman of the Company) were, by reason of the Company being a corporation and not compellable to answer on oath, necessary parties for the purpose of discovery, prayed that the Company might be decreed specifically to perform the agreement made by them with the plaintiffs, and such other holders of loan notes to whom shares had not been issued respectively, by causing the names of plaintiffs, and of such other holders, to be entered in the books as holders of shares after the rate, &c., and that the Company might be ordered to deliver certificates on plaintiffs and other holders delivering up loan notes. And the bill further prayed the payment of dividends up to the time of entry, and an injunction to restrain the Company and other defendants from paying any dividend of the profits of the Company, so as to exclude plaintiffs, and from parting with any shares raised in pursuance of the act 6 & 7 Vict. to any persons other than plaintiffs, and such other holders of notes.

By agreement between the parties, the several documents hereinbefore stated were admitted; and it was admitted

that a special general meeting of the Company had been convened on the 5th of June, 1845, at which a motion was made that the meeting should adjourn; and thereupon an amendment had been put, recommending the directors to issue shares to those holders of loan notes who had not given notices to convert the same into shares, previous to the 15th of February then last, and that thereupon the motion for adjournment had been put and carried, and the meeting had adjourned accordingly. And it was also admitted that the plaintiffs had not given notice to convert their loan notes into shares on or before the 15th of February, 1845; but that they had given such notice before the holding of the special general meeting of the 5th of June, 1845.

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Mr. *Bethell*, Mr. *Wood*, and Mr. *Goldsmid*, for the plaintiffs.—The advertisement is ambiguous, and fixes no time for the declaring of an option, and the indorsement is the only contract the defendants can rely on. Now, that indorsement is a mere intimation, which is not under the seal of the Company, and which cannot be enforced by either party. If this Court would not compel the Company to apply for an act, neither would it compel the plaintiffs to declare their option. The act was to declare the terms on which the holders were to take new shares. Now, it is not enacted that the shares shall be delivered by way of exchange for the securities of such lenders as should declare an option on the 15th of February, 1845, which is the language of the indorsement on the note; but declares that the shares shall be appropriated and disposed of in manner to be resolved on by a future general meeting of the Company. The resolution by which the Company declined the power to impose or waive the conditions, prescribed no terms, and, therefore, it was fair for the shareholders to conclude, that, by force of the resolution executing the act of Parliament, the shares had been declared

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liable to be allotted among the holders of the loan notes without condition or restriction in point of time; except this, that the holder of a loan note must claim to have it converted into a share before the note itself became payable. The statutable right of the holders of loan notes became perfect by virtue of the act of Parliament. But independently of the first argument, if the holders of notes are to have the power of converting them at the end of three years from the time when they received them, the notes not having been delivered until the month of July, 1842, and the subscribers not having even the right to receive them before the day on which the whole money was paid, had certainly until the month of July, 1845, to declare their option to convert them into shares. But if the Company are right in supposing that three years are to be reckoned from the 15th of February, 1842, then the Company must allow the note holders a fair and reasonable time after the expiration of the three years, and not compel them to come in within the first hour after the three years have expired. The directors are, in fact, trustees of the shares for the note holders, and are bound to give them a fair opportunity of declaring their option.

Sir *F. Kelly*, S. G., Mr. *Romilly*, and Mr. *Adams*, for the Company.

Mr. *Wray*, for the defendants Hill and Crowley.

The bill in this case is filed for the specific performance of an agreement, and, therefore, must rest wholly on the contract between the parties; the plaintiffs' case cannot be treated as a mandamus to the Company to conform to the terms of an act of Parliament. The act commands nothing, but only empowers the Company—"it shall be lawful" for them to raise money by the creation of new shares. The contract does not depend on the act of Parliament, for the Legislature would not vary the terms of a contract when one of

the contracting parties was not before them, nor could the subsequent resolutions for the same reason affect the original contract. The question, therefore, to be determined is, what is the legal effect of the contract depending on the advertisement of the 21st of January, 1842, and on the loan note, which was given by the one party, and accepted by the other, at the time when the last advance was made? By the terms of the advertisement, five years and three years must commence and be computed from the first advance in February, 1842, in order to give effect to the words on the loan notes, "bearing interest in the meantime." The interest would accrue from the day of the first instalment being paid, and this must determine the construction. But if this be not so, and, for the sake of argument, it is admitted that the advertisement is ambiguous, the loan note, at all events, fixes the period; for it bargains that on the 15th of February, 1847, the whole sum advanced shall be repaid.

The contract is not altered by the act of Parliament, for it does not allude to it, and probably the Legislature did not know of the existence of the contract. The subsequent resolution was merely an authority to raise and allot shares in accordance with the act, but it refers back to the contract, and only varies one term of it, by permitting the holders of notes to accept integral instead of quarter shares.

Time is of the essence of the contract in this and in all cases where an option is given of taking one mode of repayment instead of another, or where any act is to be done with respect to a subject varying in its value: *Doloret v. Rothschild* (a), *Sparks v. Liverpool Waterworks Company* (b), *Mason v. London and Croydon Railway Company* (c).

The day on which the option was to be declared having passed, the rights of the plaintiffs have ceased as to the

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(a) 1 S. & S. 590.

(b) 13 Ves. 428.

(c) Ante, p. 62.

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shares; and if the directors were now, on a principle of generosity, to depart from the form of the contract by allotting them shares in exchange for their loan notes, they, as trustees, would be held responsible to the body of shareholders for such act of generosity.

Mr. *Bethell* replied.

The VICE-CHANCELLOR, (after stating the documents hereinbefore set forth).—It is admitted that the plaintiffs would have been entitled to convert their loan notes into shares up to and on the 15th of February, 1845; but the Company contend that, in order to entitle themselves so to do, it was necessary that the plaintiffs should have given notice of their intention on or before the 15th of February, 1845, which it is admitted was not done. No such notice, in fact, was given until June following. The plaintiffs contend, that no time was fixed within which it was necessary that notice should be given; or if any time was fixed, that it was at the expiration of three years from the 15th of July, 1842, when the last instalment of the loan which the notes represent was paid, and before which time their option was declared; and they also insist, that, if any notice was necessary which was not duly given, the Company had waived all objection on that ground. The question I shall first advert to is, whether any and what time was fixed by the contract within which the loan-note holders desiring to convert their loan notes into shares were bound to give notice of such desire?

Now, taking the resolution of the 20th of January, 1842, and the advertisement together (upon the credit of which the plaintiffs say they advanced their money), my opinion is, that the five years mentioned in both these documents as the time when the loan notes were to become payable would expire at the end of five years from the date of the first instalment; that is, on the 15th of February, 1847. It appears to me to

be manifest, upon these documents alone, that the relation of debtor and creditor was to terminate at the expiration of five years from its commencement, and that, by the very terms of both the resolution and the advertisement, every creditor who paid an instalment on the 15th of February, 1847, became, when he had paid the remaining instalments, entitled to claim a loan note, under the seal of the Company, payable at the end of five years, from the 15th of February, 1842. It is true, the loan in each case, though contracted as from the 15th of February, 1842, was not complete until the third instalment was paid on the 15th of July, 1842. But the relation of debtor and creditor commenced on the 15th of February preceding, and the repayment of the advance then made was not, as I read the resolution and advertisement, to be postponed beyond five years; and, if I am right in saying that the creditor was entitled to have that first advance repaid him at the expiration of five years from the time of its being made, the circumstance that the rest of the loan was payable by instalments can make no difference, for unquestionably the whole loan in each case was to be repaid at one time. If, however, a doubt could exist upon this so far as the resolution and advertisement go, it would be removed by the loan notes themselves. On July 15th, 1842, the parties making the advance became entitled to and claimed their loan notes, and the loan notes were accordingly made and delivered to the parties entitled, payable on the 15th of February, 1847, with interest half-yearly, on the 15th of August and the 15th of February in each year. These notes have since been acted upon, and are as much the acts of the payers as of the makers. And as no objection is made to them on the ground of mistake or otherwise, the 15th of February, 1847, is conclusively fixed, for the purposes of this suit, as the expiration of the five years mentioned in the resolution and advertisement of January, 1842, for payment of the loan notes. Now, if the 15th of

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February, 1847, be the expiration of the five years mentioned in the resolution and advertisement of January, 1842, the 15th of February, 1845, must be the expiration of the three years mentioned in the same documents.

The next question is, whether it was necessary that the holders of loan notes should, before the 15th of February, 1845, have given the notice insisted upon by the directors, and whether their omission so to do has precluded them from successfully claiming shares in the Company in exchange for their loan notes? The resolution of the 20th of January, 1842, proposed to give an option to convert the loan notes into shares "at the expiration of not more than three years;" that is, not after the 15th of February, 1845. But nothing is said in terms about notice. The resolution says only that the conversion is to be not after the 15th of February, 1845. The advertisement referring in terms to the resolution of the preceding day states the option to be exercisable at the expiration of three years; a statement which does not extend the time given by the resolution. And if the case depended wholly upon the resolution and advertisement, I confess I do not see what there would be in the case to preclude the Company from contending with effect that the time for conversion was gone, at the latest, on the night of the 15th of February, 1845. Has, then, anything happened to alter the case?

The transaction next in order was, the making and delivery of the loan notes, which, so far as the force thereof is concerned, are not objected to. Now, the endorsement on these notes, about which so much was said, does not alter the contract as to the time for the conversion or otherwise, except that it may be said that under the resolution and advertisement the conversion might have been made on the 15th of February, 1845, without any previous notice, whereas the endorsement requires notice on the 14th of February at latest; and if the question in this cause had been, whether a claim on the 15th of February to have the

exchanged for shares had been resisted upon the ground only that no notice was given before that day, I will say what in my opinion the proper decision would have been.

But no such question has arisen. On the contrary, the plaintiff alleges, and the answer admits, that all persons who held on the 15th had their claims allowed. The plaintiff, however, made no claim until June, 1845; and the effect made by the bill is, that the plaintiffs omitted to give notice because they were ignorant that any notice was required; and that if they had been aware that notice was required, they would, to avoid disputes, have given notice. The plaintiffs, as a further excuse for not making their demand on or before the 15th of February, say, that the engagements on the notes promised the holders that an act of Parliament should be applied for, "under the terms of which" the holders of notes would be entitled to convert them into shares; and it is said, that, until such an act was passed, the holders of notes were justified in supposing they would not be deprived of their option to exchange their notes for shares.

I cannot concede that these suggestions, or the arguments founded upon them, are sufficient grounds for giving the plaintiffs a relief to which, in my judgment, they would otherwise be entitled. Omitting the suggestion respecting the act of Parliament, the case is simply this,—the creditors of the Company, being (by that which the plaintiffs say was their contract) entitled to loan notes, and provided previous notice was given, they had power to convert them into shares, not later than the 15th of February, 1845, pay their last instalment, upon which their liability to the loan notes becomes complete in July, 1845, except the loan notes, by which the makers, not until the time for the conversion, state that previous notice will be required. I will not now express any opinion, whether, if the payers had objected to or protested against the endorsement, so far as it regards the

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notice, they could have maintained a claim to have notes given them without such endorsement. They did not,—and it is obvious that the point was not worth contending for,—they did not object to or protest against the endorsement; they accepted the notes without objection, and have since treated them as valid instruments; and what they now ask me to decide, and that, upon a bill for specific performance, is, that because the endorsement, in which they acquiesced, was put upon the notes, I am, as against the Company, to vary the substance of the agreement between the parties, by holding that time is immaterial.

If the plaintiffs really considered the endorsement not binding, although not objected to at the time the notice was given, they ought at the latest to have made their claim under the resolution and advertisement of January, 1842; *i. e.* not later than the 15th of February, 1845; and not have waited until the following month of June, taking the chance of the rise or fall of the market. Indeed, the plaintiffs' argument rather halts on this part of the case; for, if the endorsement were present to their minds, the suggestion in the bill, that they were ignorant that notice was required, cannot be true; and if the endorsements were overlooked or forgotten, they have no excuse for not claiming on the 15th of February; and so also if, having the endorsement in mind, they intended to disregard it. With respect to the act of Parliament, I am not informed what precise application was made to Parliament; but, as the pleadings make no point upon this as a matter of fact, the plaintiffs cannot well complain that the defendants have said nothing on the subject. This, however, is clear, although the Company might promise to apply for an act of Parliament to contain certain specified terms, no one could suppose the Company intended to guarantee the loanholders that they would obtain such an act, or, indeed, any act. If the Company applied for and obtained an act empowering them to do all which the resolution of the 20th January and the advertise-

ment promised,—empowering them to give shares in exchange for loan notes,—I cannot give credit to the plaintiffs' assertion as matter of fact, (not denying notice of the act, or of the resolution of the 9th of January, 1845), that they, or any note holders, were misled in the way suggested in the argument; and, in order to satisfy myself as to this opinion, I looked into the answer, and there I find it stated that about nine-tenths of the holders of notes applied on or before the 15th February to exchange their loan notes for shares, and received shares accordingly.

I did not find any difficulty in this case until I came to the resolution of the 9th of January, 1845, which is open to criticism. The act empowers the Company to issue shares "to be appropriated and disposed of in such manner, for such prices, and by such ways and means, as by the order of any general or special general meeting of the Company shall be provided." The act, therefore, sends us to the resolution of the Company of the 9th of January, 1845, for the appropriation and disposition of the shares; and here the wording of the resolution is perhaps inaccurate, for, according to the literal construction of the resolution, it appears to send us to the act of Parliament to ascertain the very thing, to ascertain which the act appears to refer to the resolution. But the resolution is free from all ambiguity to this extent, that it allots the shares to the holders of the loan notes, and does so allot them (in my judgment) according to the existing rights and interests of the holders. Such degree of inaccuracy as is found in the resolution may be easily explained, and certainly causes no ambiguity. I do not see any foundation for the suggestion that the terms of the contract have been waived by the Company. The bill must be dismissed with costs.

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BEFORE THE V. C. OF ENGLAND.

Nov. 13th. **Ex parte PUMFREY Re OXFORD, WORCESTER, and WOLVERHAMPTON RAILWAY COMPANY.**

Where a sum of money is in court to be invested in land, the Court will order a reference as to a proposed investment, but will refuse to make any prospective order as to any other investment in the event of the one proposed being rejected.

THIS was a petition presented on behalf of a person interested in a sum of money paid into court by the above-mentioned Railway Company, for the purchase of lands taken by them under their act; and it prayed a reference to the Master to inquire whether a proposed purchase would be a proper investment of such monies; and if not, then that the Master might be at liberty to approve of a proper investment, when it should be presented to him.

Mr. J. H. Palmer, for the petitioner.

The VICE-CHANCELLOR granted the order of reference as to the proposed investment, but refused to make any order as to any prospective investments, if the proposed one should not be found eligible.

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BEFORE THE LORD CHANCELLOR (a).

RIGBY v. THE GREAT WESTERN RAILWAY COMPANY.

7th & 8th
July.
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It was a motion to dissolve an injunction granted by the Court, V. C., restraining the Railway Company from passing the Swindon station without stopping for the benefit of passengers. The facts of this case will be found in the report of the application for an injunction in the Court below (b). Subsequently to the judgment in the Court below, an application was made by the defendants, the Railway Company, to the Vice-Chancellor for a special case, which was granted; and such case was inserted in, and was a condition of, the order.

The Court below having granted an injunction pending the decision of a case, sent for the opinion of a court of law:—
Held, by Lord Chancellor, on motion to dissolve the injunction, that the plaintiffs' equity depending on the legal effect of a covenant, they had no *locum standi* in a Court of equity to apply for an injunction; that in cases of this sort it is the duty of the Court to put matters in a course of legal inquiry, in order to establish the validity of the legal right before it grants an injunction, and

Stuart, Mr. Romilly, Mr. Unthank, and Mr. Stevens, the appellants, contended, that the plaintiffs, Rigby, were incompetent to proceed under the covenant, unless they were specially called on by their sub-lessee so to do, or had a breach of the covenant; that the plaintiffs in the suit were mere trustees; *James v. Biou* (c). They also contended, that there were still covenants to be performed on the part of the plaintiffs, of which the Court could not then compel specific performance; and, consequently, no specific performance

the Court to make such order as will secure to either party what he may ultimately be entitled to.

the loss could be ascertained, but the loss in the other, if the injunction was not granted, or compensation given, the injunction should be dissolved, and the Court to pay such sum of money, by way of damages, as the Court

the Court depends on a disputed legal right, the Court will not be bound to prepare a case or not, as he may think proper, for the Court of law; but, for its own security, will order a case to be made, if parties differ.

(b) *Ante*, p. 175. (c) 2 S. & St. 600.

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of other parts of the contract could be enforced: *Gervais v. Edwards* (a).

Mr. *Wood*, Mr. *Bailey*, and Mr. *Fitzherbert*, *contra*, contended, that all the legal questions which the defendants had set up had been decided in their favour, and that it was incompetent to them to raise new questions of law, in order to prevent the injunction issuing against them. That, under their covenant, the defendants, by passing the station without stopping, must be wrong-doers to Griffiths, to whom the plaintiffs, Rigby, under their covenant, were liable for any loss, or to the plaintiffs themselves; so that, *quæcunque viâ*, the defendants, the Company, either in respect of the liability of the Rigbys to their sub-lessees, or in respect of the direct injury to themselves, ought to be restrained from doing that which must ultimately fall on the plaintiffs. That this was not like the case of *Gervais v. Edwards*, as the conditions of the contract on one side have been performed so far as the plaintiffs were liable to perform them; and the existence of covenants, which the defendants might hereafter be called on to perform, did not render the partial fulfilment of the contract less obligatory on them: *Lord Grey de Wilton v. Saxon* (b), *Rolfe v. Rolfe* (c).

The LORD CHANCELLOR.—It is quite clear, as far as Rigby's own interest is concerned, that Rigby has no *locum standi* here at all, because it is in respect of the immediate damage to the profit arising from carrying on a business (which he is not, in fact, carrying on) that an injunction is asked. But that is not the ground upon which the plaintiffs rest their case. The plaintiffs say they are under liabilities, which give them an interest in the profit or loss of profit obtained by Griffiths; and, under a covenant, they

(a) 2 Dr. & W. 80.

(b) 6 Ves. 106.

(c) 10 Jur. 6.

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are liable, or may be liable, to Griffiths, although he has not called upon them to take any proceedings to enforce his supposed rights. The Vice-Chancellor *Wigram* thought that a question of some difficulty, and proposed that it should be a matter of consideration by a court of law. Now the plaintiffs, as I understand it, are desirous of going on with that case, which is one purely of law; and the injunction is made to depend upon a supposed legal right or legal liability. The plaintiffs say, "Because we are liable upon this covenant, we ask a court of equity to protect us, in order to prevent the damage for which we, under our covenant, may be liable to make compensation to the defendant Griffiths." That is an equity depending upon the legal effect of the covenant which the parties have entered into between themselves. This being the state of things, after what has taken place, it is very right that the case should proceed.

I do not wish to take upon myself to decide this matter. The Vice-Chancellor had thought it one of some difficulty; and the counsel for the defendants has asked the Court to put it in the form in which it now is; and the other parties admit that the equity depends upon the legal right, and are willing to put the validity of their legal right into a course of legal inquiry. It is proper that the legal rights of the parties should be ascertained; but then the question is, what ought to be done in the meantime—whether there ought to be an injunction or any other order made, which may secure to the one party whatever he may ultimately be found entitled to, without the least possible damage to the other?

In considering a case of this sort, particularly where the equity depends upon a legal right, the Court looks at both sides of the question, and looks to see, according as the decision should be on one side or the other, in which way the least loss will fall upon either party. Now, if the Court of law should be of opinion that the plaintiffs have no right of action, and that they are not liable, and that Griffiths has

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no right of action, and, therefore, there is no legal liability in the Rigbys under existing circumstances, then, if the injunction continue, I am to consider how I am to give compensation to the Company. I cannot conceive the possibility of giving compensation to the Company for the loss which they might sustain from the inconvenience of their express trains having to stop a certain length of time at Swindon. There is no possible mode of ascertaining it, nor would a jury have any possible means of forming a conjecture. On the other hand, if it turns out that the plaintiffs, Rigby, are liable for any loss to Griffiths, and that they are entitled to interfere and protect themselves against the damage which may be sustained by Griffiths, undoubtedly it is a damage which the Court can ascertain, and which the Company will be liable to pay for under their covenant with Rigby; and it seems to me, therefore, that the order which will protect all parties from damage, or indemnify them for any damage they might sustain which they ought not to have sustained, will be, to dissolve the injunction, the Company undertaking to pay such sum of money, by way of damage, for the violation of their covenant, as shall be ascertained in such manner as the Court shall direct.

That would entirely avoid all the difficulty which has been suggested to me of successive actions at law. At common law the jury would not be able to ascertain the damages; and this order will leave in the disposition of the Court in what way the damages are to be ascertained, and in what mode they are to be paid. Of course the Company, if they accept that proposition, will not hesitate to give the best security to be approved by the Master.

After a discussion between the counsel as to the form of the case, and the way in which it was inserted in the order of the Vice-Chancellor,

The LORD CHANCELLOR said,—My opinion is, that when

the Court is applied to for an injunction to protect the parties applying from a violation of their legal right, if the Court does not clearly think they ought to have what they ask, or even if it do—even if it is a very clear case, the course of the Court is to put it in a way to have that legal right ascertained, and the duty of the Court is to protect the rights of the parties in the meantime; and therefore it ought not to be in the option of the defendants if they think fit, but (for the purpose of applying the equity) it is the duty of the Court to have the legal rights ascertained. The order I shall make will be, to have a case prepared for the purpose of taking the opinion of a court of law as to the liability of the Messrs. Rigby to any action that might be brought by Griffiths for any breach of the covenant contained in the lease under which Griffiths now holds, and that Griffiths is to state such facts as may be considered to be important upon the trial of the legal right; and if the parties cannot agree, it will go to the Master to settle the case. In the meantime the injunction will be dissolved, the Company undertaking to account for the damage sustained by the breach of their covenant with Rigby, to be ascertained in such manner as the Court shall hereafter direct, and to give such security as the Master may require (*a*).

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THE minutes, as drawn up by the Registrar on the 8th July, were as follow :—

“ The defendants, the Great Western Railway Company, by their counsel undertaking to keep an account of all passengers who shall daily pass the Swindon station in the trains called ‘ express trains,’ and also to keep an account of all passengers who shall daily pass the same station in trains which shall stop there for the purpose of refreshment, and to pay such sum of money by way of damages

(*a*) See *Spottiswoode v. Clarke*, 2 Ph. 156

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(if any) as this Court shall deem right, to be ascertained in such manner as this Court shall direct, let the order made in this cause by his Honor, *Wigram*, V. C., dated the 22nd January, 1841, be discharged, and let the injunction be dissolved, and let a case be made for the opinion of the judges of her Majesty's Court of Exchequer, and let the question in such case be, whether the defendant S. Y. Griffiths can maintain an action at law against the plaintiffs, J. D. Rigby and C. Rigby, to recover damages under the following covenant on the part of the said J. D. Rigby and C. Rigby, contained in the indenture of underlease of the 24th December, 1841, in the plaintiffs' bill in this cause mentioned,—that is to say, 'that they, the said J. D. Rigby and C. Rigby, their executors, administrators, and assigns, shall and will, from time to time, and at all times during the continuance of the term hereby granted, do all such acts and things as shall be necessary and proper for enforcing the fulfilment and performance of the covenants and agreements hereinbefore particularly recited or set forth, and in the said hereinbefore recited indenture of lease contained on the part of the said Great Western Railway Company, for giving the full benefit and advantage to the said S. Y. Griffiths, his executors, administrators, and assigns, of the refreshment-rooms and premises hereinbefore demised during the term hereby granted, in the same manner as if the said S. Y. Griffiths were the assignee of the said covenants.' And let all facts necessary to bring the matter in question before the Court be stated in such case, and refer it to the Master of the Court to determine in such case if the parties differ, and let the Master of the Court report the result of his proceedings before the said Master of the Court to the Court of Exchequer, and let the costs of the proceedings be at liberty.

judges of the Court have made their certificate, such further order shall be made as shall be just, and any of the parties are to be at liberty to apply to this Court as they may be advised."

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The defendants, conceiving that the minutes as drawn up would convey an intention, on the part of the Court, that the question for the Court of law would be, whether there had been such a breach of covenant by the plaintiffs as would entitle the defendant Griffiths to recover from them substantial, and not merely nominal damages, proposed to insert the words, "or more than nominal damages," after the word "damages" in the minutes, and the plaintiffs refusing, an application was made to the Court for that purpose.

The plaintiffs objected to the insertion, on the ground that the question so left would be improper, inasmuch as it would be impossible for the judges to decide more than that there had been a right of action reserved to Griffiths, (the amount of damages being wholly a question for a jury).

The *Lord Chancellor*, however, intimated an opinion that damages would mean substantial damages, and refused to entertain the application, and directed the minutes to stand as drawn up by the Registrar.



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BEFORE V. C. KNIGHT BRUCE.

Nov. 21st,
Dec. 14th.*Re* THE EASTERN COUNTIES RAILWAY COMPANY.*Ex parte* HOLLICK.

On a petition for investment of purchase-money of lands taken by a Railway Company, and payment of dividends to tenant for life, the Court will not, even under special circumstances, dispense with the usual affidavit of the petitioner as to goodness of title, &c.

A PETITION had been presented by Anne Hollick, the tenant for life of certain lands, which the Eastern Counties Railway Company had taken, under the powers of an act enabling them to make a branch railway to Ely, Brandon, and Peterboro' [7 & 8 Vict. c. lxii.], whereby it appeared that the petitioner had herself contracted for the sale of these lands to the Company for £920, and that the Company had approved of the title, and the money had been paid into Court in the usual manner.

The petition prayed the investment of the purchase-money and the payment of the dividends to the tenant for life. An order was made in accordance with the prayer; but before the order was drawn up, the Registrar of the Court required an affidavit in accordance with the terms of the Exchequer Order of the 4th July, 1828 (a).

This was an application to the Court, under the special circumstances of the case, to dispense with such affidavit.

(a) The order was as follows:—

“Petitions under acts for sale of property. Exchequer Order, 4th July, 1828. Letter from the Lord Chancellor to the Senior Registrar, 12th February, 1842.”

“In all petitions under acts of Parliament for sale of property for public purposes, when the purchase-money is directed by the act to be paid into court, the

petitioners claiming to be entitled to the money so paid in, must, in addition to the usual affidavit verifying their title, make oath that they believe they have a good title, and are not aware of any right in any other person, or of any claim made by any other person, to the sum of £—, in the petition presented by them in this matter mentioned, or any part thereof.”

r. *Archibald Smith*, in support of the petition.—The immediate reasons for this application are, the great age and infirmities of the petitioner, which will render it extremely difficult to procure from her such an affidavit as the officer of the court has required; but independently of these, the order referred to is not intended to apply to a case in which the petition is presented by the person who has contracted with the Company, by whom the title has been approved and accepted at their own risk. The Company by their acts have relieved the Court from all responsibility.

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The Railway Company appeared, by their Counsel, to oppose; but the *Vice-Chancellor* declined to give any sanction to the Registrar to dispense with the usual affi-

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Dec. 16th.

THE facts of this case are stated ante, p. 205.] The petition of the parties to apply to the Lord Chancellor for rehearing, as suggested by the Vice-Chancellor, having been abandoned, a petition was presented in the cause, in the points reserved at the former hearing were submitted for his Honor's consideration.

The decree, as drawn up, left the question of liability to the calls on the purchased as well as on the original shares undetermined.

A testator, who, at the time of his death, was possessed of fifty original and seventy purchased shares in a railway, the calls whereon had not all been made, by his will gave thirty whole shares in the said railway to trustees for the

of a married woman for life, without power of anticipation, and thirty shares to B. five original and five purchased shares having been allotted by the executors to each of them:—*Held*, that the testator's estate was liable to pay the calls on the original and on purchased shares, and a sufficient sum to cover the unpaid calls was ordered to be placed in a separate account, and laid out, and the income meanwhile paid to the persons entitled to the said residue.

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The points reserved were argued by the same counsel for the different parties as on the previous hearing (*a*).

KNIGHT BRUCE, V. C.—The first question is, as to the literal construction of the instrument called the Parliamentary contract, which appears to me to be a deed. It has been contended that the language of the covenant, mentioning the term of ten years, did not create any liability after the end of the ten years, if the money should not be paid within that time. That covenant however, awkwardly worded as it is, cannot be read alone. The whole instrument must be read together. At the outset I find a declaration in the nature of a covenant by all the parties, that they have subscribed each so much to the undertaking. Taking the whole together, I must consider the true construction of that instrument to be, that it was an absolute covenant to pay the money within the ten years, or at such time as should be appointed. It was not a covenant that if the money was not paid in ten years it should not be paid at all. I therefore think there was an absolute obligation to pay the money. That, however, is a mere point of legal construction. I stated, when this case came before me some time ago, that if either of the parties wished for the opinion of a Court of law on the construction of the covenant, I had not then, and I have not now any objection to direct a case; but as each party wishes to have an opinion from me, I now give my opinion.

The next question is, whether the true construction of the act of Parliament, having regard particularly to the clauses to which my attention has been directed (*b*), was to

(*a*) As to the question (decided on the former hearing, *antè*, p. 209) whether, in cases of specific legacies, the power of selection was in the legatee or the ex-

ecutor, see *Fontaine v. Tyler*, 9 Pri. 94.

(*b*) 5 & 6 Will. 4, c. cvii, s. 151. "That the several parties who have subscribed, or shall

relieve the parties who executed that deed of covenant from the liability which they had incurred in respect of it? I am of opinion that there is nothing in any one of the clauses which have been brought to my attention to take away the liability created by the original covenant. If I am right in that view, the testator, as between himself and the Company, was personally liable at his death; and his estate became, immediately after his death, liable to the Company for the sums due in respect of the shares subscribed for by the testator, however he might have bequeathed them. Assuming that to be so, I am unable though I confess I felt some difficulty in assenting to that case) to distinguish the fifty original shares from the twenty shares, the subject of the judgment in *Blount v. Hipkins* (a),

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subscribe, towards the undertaking, shall pay the sums respectively subscribed for, or such parts or portions thereof as shall from time to time be called for by the directors, at such times and places, and to such persons, as shall be directed by the directors; and in case any party shall neglect or refuse to pay the money so subscribed for, the directors may sue for and recover the same in any court of law or equity."

Sect. 153. "That the directors shall have power, from time to time, to make such calls of money from the subscribers to, and proprietors of, the said undertaking for the time being, to pay the expenses of the same, and they from time to time shall do so necessary, subject to the regulations as to the amount of the same;" &c.; "and if any owner of a share for the time being neglect or re-

fuse to pay his rateable proportion of the money called for, the same may be sued for and recovered; or the said directors may declare the shares belonging to such owner to be forfeited, and order such shares to be sold."

Sect. 158. "That it shall be lawful for the several proprietors of shares, and their respective executors, administrators, and assigns, to sell and dispose of any shares to which they shall be entitled therein, subject to the rules and conditions hereinafter mentioned,—that is to say," &c.; "and the clerk of the said Company shall enter a memorial of the transfer and sale in a book to be kept for that purpose; and until such memorial shall be made and entered, the vendor shall remain and be held liable for all future calls on such shares."

(a) 7 Sim. 51.

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a case decided by a judge of great learning, discretion, and experience in the interpretation of acts of Parliament, and from which I think I ought not to depart on any notion of my own. Even if I felt more strongly on the point than I do, that decision in *Blount v. Hipkins* ought to outweigh any doubts of mine.

The next question is, as to the five shares (a). They stand somewhat on a different footing. It appears, as I understand it, that, as to these five shares, the testator had not executed the deed of covenant which I have read, but that he bought them, before the act of Parliament had passed, from a person who, in respect of them, had executed that deed; and when the act passed, he held them, and became the registered proprietor. If no liability attached to the purchaser in any other way, I should suppose, by the mere force of law or of equity, or both, where a person has executed the deed in respect of certain shares, and sold those shares, and all his right thereto, it must be taken to have been part of his contract that he should be indemnified by the purchaser from all liability in respect of calls on those shares. That must be taken to be the principle and reason of all purchases of this description. It follows then that substantially the contract on the part of the testator who bought these shares was to indemnify those who were personally liable to the Company upon them. By analogy, if a man takes an assignment of a lease without express contract, it is understood he takes the liability to indemnify his assignor from liability in future with respect to the covenants. If this be so, and I am right in my view, the liability, though not in the same form or mode, is substantially the same with respect to the five purchased as to the twenty-five original shares, and the same rule must apply to both sets of shares; and the calls

(a) The number of purchased shares required to make up the full legacy of thirty shares, each

legatee taking twenty-five of the original shares.

the twenty-five original, as well as the calls on the five purchased shares must be paid out of the testator's estate. I decide this case in accordance with the case of *Blount v. Tipkins* (a), which, as regards both sets of these shares, cannot be substantially distinguished from the present. A sufficient sum to cover these calls must be placed to a separate account, and laid out, and the income paid to those who are entitled to the general residue. Such a question might very fairly be made the subject of an appeal.

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[In the course of the judgment his Honor made the following remarks: "The decree appears pointedly, and in words, to reserve the question of the liability of the testator's estate to pay the calls as well on the twenty-five as on the five shares; which induces me to think that there must have been some mistake in what I said, or was reported to have said, in January last, when this case was before me. If I was in error in the course of the discussion, or in my judgment, it appears plainly from what has been read that it was corrected before the decree was drawn up."]

(a) 7 Sim. 51.

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BEFORE THE V. C. OF ENGLAND.

24th & 25th
April.THE LANCASTER AND CARLISLE RAILWAY COMPANY v.
THE MARYPORT AND CARLISLE RAILWAY COMPANY.

The defendants, a Railway Company, obtained an act for making certain branch railways, and it was thereby provided, that nothing therein contained should extend to prejudice, diminish, alter, or take away any of the rights, privileges, powers, or authorities vested in the plaintiffs, (also a Railway Company), under

THE bill filed on the 18th March, 1846, stated, that by an act (*a*), intituled "An Act for making a Railway from the Lancaster and Preston Junction Railway at Lancaster, to or near to the City of Carlisle," the plaintiffs were empowered to purchase and hold lands for the purposes of their undertaking, and to make and maintain their railway; and they were by their act also empowered, in addition to the land authorised to be compulsorily taken, to contract with any party willing to sell the same for the purchase of any land adjoining or near to the railway, not exceeding in the whole fifty acres, for the purpose of making and providing additional stations, yards, wharfs, and places for the accommodation of passengers, and for receiving, depositing, and

their act, but all rights, privileges, and franchises of the said Company, and all the powers, authorities, and provisions in the said last-mentioned act contained, were saved and reserved to them as if the defendants' act had not been passed: so always nevertheless that such rights, privileges, franchises, powers, authorities, and provisions, be not exercised in such a manner as to prevent the defendants from compulsorily taking and using land of sufficient breadth to admit of the formation of the extensions or branches thereinbefore authorized, such extensions or branches, however, not to exceed respectively twenty-two feet in breadth at the level of the rails, with sufficient breadth for the necessary slopes.

The plaintiffs were empowered by their act to take certain lands compulsorily, and also to take certain other lands with consent. The defendants had power to take compulsorily certain lands scheduled in their act, amongst which were certain pieces of land which the plaintiffs had purchased, with the consent of the owners, subsequently to the date of the defendants' act.

The defendants gave notice of their intention to take, under their compulsory powers, a greater quantity of the pieces of land purchased by the plaintiffs than was required for the line of their railway, for stations, &c., whereupon the plaintiffs filed a bill and applied for an injunction to restrain the defendants from taking more of their land than was necessary for their line of railway.

Held, that the plaintiffs, having occupied the ground before the defendants, were entitled to hold so much of it as was not actually wanted for the formation of the defendants' railway. Injunction granted, with liberty to plaintiffs to bring action to try the legal right.

(a) 7 Vict. c. xxxvii.

loading or unloading goods or cattle to be conveyed upon the railway; and for the erection of weighing-machines, toll-houses, offices, warehouses, and other buildings and conveniences; or for the purpose of making convenient roads or ways to the railway, or any other purpose which might be requisite or convenient for the formation or use of the railway; and that it should be lawful for all parties, enabled so to do, to sell and convey land required for any such additional purposes.

That, in pursuance of their powers, the Company proceeded to construct their railway, and had completed some portion of their works, but a considerable portion still remained to be done.

That plaintiffs had under their powers purchased, and were then absolutely entitled to, certain pieces of land in the township of Botchergate, which were convenient and requisite for the formation and use of their railway, and amongst others, for the purpose of providing additional stations, &c.

That, by an act, intituled "An Act to amend the Acts relating to the Maryport and Carlisle Railway, and for making certain Extensions and Branches connected therewith," which was passed on the same day as the first-mentioned act, the defendants were authorised to make certain extensions of their railway, and for that purpose to take and use such of the lands delineated and described in their plans and book of reference, as the Company should deem necessary for the purposes of their act; and it was thereby enacted (sect. 6), that the defendants, in making their extension and branch railways, should not have power to deviate to the westward from the line on the plan deposited, where the line was shewn to pass through any land of the plaintiffs, or any land which they had contracted, or had power under the act, to purchase, but should have power to deviate from such line to the eastward, to a distance not greater than ten yards in a town, and 100 yards elsewhere, without pre-

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vious consent of the owners. And it was further enacted (sect. 16), that nothing in the said act contained should extend to prejudice, diminish, alter, or take away any of the rights, privileges, powers, and authorities, vested in the plaintiffs, but all rights, privileges, and franchises of the plaintiffs, and all such powers, authorities, and provisions in the plaintiffs' act contained, were saved and reserved to them as if the defendants' act had not been passed; so always nevertheless that such rights, privileges, franchises, powers, authorities, and provisions, were not exercised so as to prevent the defendants from compulsorily taking and using land of sufficient breadth to admit of the formation of the extension thereinbefore authorised; such extension, however, not to exceed twenty-two feet in breadth at the level of the rails, with sufficient breadth for the necessary slopes.

That the authorised agent of the defendants gave notice that they intended to take and use, and offered to treat for the purchase of, two acres and nineteen perches of a piece of land, parcel of certain lands described in the plan and book of reference deposited by the defendants, and therein numbered 5, 5a, 11, and 12.

That the pieces of land consisted, first, of a strip of land, containing 2 R. 8 P., abutting south on the plaintiffs' railway and the Newcastle and Carlisle Railway, at the point of junction of those railways, which included a portion of a public footway, numbered 5a, and together with the residue of the strip, exclusive of the footway, was numbered 5; secondly, of a piece of land marked 11, containing twenty perches, covered by a messuage, used as a school; and thirdly, of a piece of land marked 12, containing 1 A. 1 R. 31 P., immediately adjoining the school.

That the defendants had entered into possession of part of the strip marked 5 and 5a, and had proceeded to construct their branch railway thereon.

That the strip of land marked 5 and 5a, was, throughout

the whole length thereof, of much greater breadth than was required for the formation of a branch railway not exceeding twenty-two feet in breadth at the level of the rails, with sufficient breadth for the necessary slopes, and in particular that the strip of land, for a length of 130 feet, was of the breadth of sixty-two feet at least, and the railway being carried on an embankment of seven feet in height, twenty-one feet was sufficient for the slopes, and twenty-two feet for the railway, (in all forty-three feet).

That the pieces of land numbered 11 and 12, were not wanted for and were to the westward of the defendants' extension line, and were part of the lands which the plaintiffs had power under their act to purchase, and had actually purchased; and that the defendants' station was to the eastward of the line of their extension railway.

The bill, after charging (among other things) that the act, by which the defendants were authorised to make such extension railway, had been passed with the consent of the plaintiffs, in pursuance of an agreement entered into between them and the defendants, whereby it had been expressly stipulated that the defendants should not be allowed to enter upon any of the pieces or parcels of land purchased by the plaintiffs, except upon such part as was necessary for the formation of the extension railway authorised by their act, and also that the plaintiffs' rights would necessarily be prejudiced to a great extent by the defendants' proceedings, prayed,

That the defendants, &c., might be restrained by decree and perpetual injunction, and until decree, by order and injunction, from taking or instituting any proceedings upon or under their notice, or any other proceedings for the purpose of compelling plaintiffs to sell the pieces of land in the notice and plan mentioned, or for assessing the sum of money to be paid for the purchase of the same, plaintiffs being ready and willing, and thereby offering, to treat with the defendants for the sale to them of so much of the strip

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marked 5 and 5a as was necessary for the formation of a branch railway of such a breadth as was authorised by their act; and that the defendants, &c., might in like manner be restrained from entering upon or taking possession of, or constructing any railway or railways, or laying down any additional lines of rails upon, or otherwise using or interfering with the same pieces of land, excepting only so much of the strip marked 5 and 5a as was necessary for the formation of their branch railway, of such a breadth as was authorised by their act; and from pulling down or otherwise injuring or interfering with the messuage then used as a school, or any part thereof, &c.

The motion was supported by affidavits. The defendants filed counter affidavits, by one of which it was stated that neither of the parcels of land marked 11 and 12, were described or delineated in the plans or book of reference mentioned or referred to in and by the plaintiffs' act; and that no part of such land was comprised within the limits allowed to the plaintiffs for deviation in making their line; and that at the time of their act passing, the plaintiffs had not contracted with the owners for the purchase thereof; and that the defendants had not taken or used a greater breadth of the strip of land marked 5 and 5a than was absolutely necessary and requisite for supporting and ensuring the stability of their embankment, and securing and fencing the same; nor had they done any act to prejudice the rights of the plaintiffs. That the defendants entered upon the strip marked 5 and 5a in August, 1844, and constructed their railway with the full knowledge, consent, and approbation of the plaintiffs; and that on or about the 2nd of February, 1846, the plaintiffs, without communicating with the defendants, purchased the pieces of land marked 11 and 12.

That having obtained the owners' consent to enter on the lands, the defendants had delayed taking any compulsory steps for acquiring possession thereof, considering that they had a parliamentary lien thereon in consequence of

much consent, and also because the pieces of land were within the limits of deviation drawn on their deposited plans.

Mr. *Bethell*, Mr. *Follett*, and Mr. *Selwyn*, in support of the motion.—The defendants have no right under their act to touch the pieces of land marked 11 and 12; but even if they have, the purposes for which the defendants want to use them is not for making the railway, but for the same purposes for which the plaintiffs have already acquired them, viz. for building stations, &c. The plaintiffs have purchased these lands under a power which by express enactment was not to be prejudiced by the defendants' acts. The true view therefore is, that the defendants' powers are made subordinate to those of the plaintiffs, with the exception only of conferring on the defendants a permanent right to take lands to the extent of what is requisite to make a railway 22 feet in breadth at the level of the rails, with sufficient slopes—conceding, therefore, that they have the right to take so much of 5 and 5a as is necessary for the railway and slopes, they have not a shadow of right to enter upon the pieces of land numbered 11 and 12—and although those pieces of land are included in the limits of deviation in the plans originally deposited, that power of deviation is entirely taken away by the express proviso in the defendants' act, that they should not deviate to the westward. Again, the defendants are attempting to make a distinction between the compulsory and permissive powers given to the plaintiffs, and, although the act is general, they would limit the plaintiffs to the exercise of their compulsory powers only. The defendants' act specially reserves to the plaintiffs all their powers, privileges, authorities, and franchise, but they are not to be used so as to prevent the defendants from making their railway. These words must necessarily refer to the permissive as well as to the compulsory powers of taking land, because the plaintiffs have

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no other means of preventing the formation of the defendants' railway, than by refusing to sell the land taken by them under their permissive powers.

Mr. *Stuart* and Mr. *Wetherell*, *contra*.—The defendants are authorised by the 2nd section of their act, to "enter upon, take, and use such of the lands delineated in the plans as they shall deem necessary for the purposes aforesaid." Now the pieces of land numbered 11 and 12 are described in the plan. If the plaintiffs have, by a subsequent voluntary contract, bought land which is subject to the powers conferred on the defendants by their act, the land remains subject to those powers; and if the original owner might have been compelled to sell to the defendants, the plaintiffs are in like manner compellable—the plaintiffs cannot use their permissive powers so as to defeat the defendants' compulsory powers. If this were the true construction, it would follow that, because the plaintiffs might at some time or other be enabled to purchase with consent, the then owner might refuse to consent, and hold the land against both plaintiffs and defendants. The parcels of land 11 and 12, are not required for the purposes of deviation, but for the works connected with the railway; and being included in the plans, fall within the defendants' compulsory powers. As to the quantity of land to be taken by the defendants for the purposes of their railway, they themselves were, by their act, the constituted judges; and unless some monstrous or extravagant demand is made out, a Court of equity has no right to interfere.

The VICE-CHANCELLOR, without hearing the reply.—I must say I think the construction of the act of Parliament perfectly clear. It may be true, that in the sort of Parliamentary battle which took place, the Legislature might, first of all, be disposed to listen to the petition of the Maryport and Carlisle Railway Company, and say, "Well, such and

such words shall be added, and we will give you that benefit." Then comes the counsel for the Lancaster and Carlisle Railway Company, and say, "Oh! but what you have conceded is too large; put a limit on it;" and accordingly the limit is put, and so it goes on, with a sort of process something like a trick with balls which we see an Indian juggler play, so that you hardly know which hand really holds them.

It appears to me that the Legislature exercised, in making this act of Parliament, just the same absolute authority with respect to the benefits it conferred and the restrictions it put on those benefits, as any capricious testator might have used, and is very apt to use, in the course of making his will. The rule applied to those cases certainly is, that the last part controls the first, and so I must treat it with respect to this act of Parliament. In the first instance, the first section gave very general powers, for it declared that, for the purposes of (what I may call for shortness) the Maryport Extension Company, they should have all the powers given by their former act, "save and except such of them as are by this act repealed, altered, or otherwise provided for;" so that in the very first section in which they give the general power, they put a very general restriction by the words that I have last used. The next section applies to the extension; and nothing, as I understand it, turns on the construction of that section, because the consent was actually given with respect to the plaintiffs taking the lands Nos. 11 and 12.

The 6th section says, "And be it enacted, that the Company in making the said extensions and branch railways shall not have power to deviate to the westward from the line delineated on the plan, or to go through any land which either of these Companies have contracted to purchase, or have power under their respective acts of Parliament to purchase." Now there is nothing said about a compulsory power, the words are only "power to purchase;" and if the Maryport Extension Company, exercising, as they thought fit, sufficient astuteness, have not taken care to con-

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tract to purchase, or to purchase 11 and 12, but have left them open to be contracted for, or to be purchased by the Lancaster and Carlisle Railway Company, they have, if I may use an expression peculiar to a certain game, left a blot which the other side took care, when they had the throw, to pick up, and the consequence was, that these words of exception have given (unexpectedly, I dare say, to the Maryport Railway Company) an advantage to the Lancaster and Carlisle Railway Company, which the Lancaster Company, I dare say, did, but the Maryport Company did not, foresee. But, if they chose to play ill at their Parliamentary game of backgammon, I cannot help it. [His Honor having referred to the section of the act, proceeded as follows:] The last question is about the slopes, and when I find it is a fact that the railway has been constructed with a given breadth at top, and with, of course, (as the Maryport Railway have made it), the necessary slopes, the only way in which they can say they have not got it with necessary slopes, or that they are entitled to a greater breadth of land at the bottom than they have actually taken, is, that they are entitled to take it for the purpose of making protections and fences against accidents, and for the purpose of having land on each side, in order that they might be enabled to repair the slopes when damaged by accident. But it appears to me, inasmuch as the General Consolidation Act has already given a sufficient power for that purpose, no more breadth can be said to be necessary for the slopes than that which has actually been taken and proved to be necessary by the making them; my opinion, therefore, is,—whether the Legislature meant it or not, whether the Maryport Company had shrewdness enough at that time to see what would be the necessary conclusion of what, I think, are very clear words in this act of Parliament, or not, I cannot tell, and I do not mean to inquire,—that the terms in which the Legislature has expressed itself are so clear, that all along I have not had a doubt about the right of the plaintiffs to the injunction which they ask.

His Honor, after some discussion between the counsel on both sides, finally determined that the injunction should be granted; and the defendants agreeing to admit a trespass, that the plaintiffs should be at liberty to bring such action as they might be advised, for the purpose of trying the legal right.

Liberty to apply.—Costs reserved.

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BEFORE THE MASTER OF THE ROLLS.

COLMAN v. THE EASTERN COUNTIES RAILWAY COMPANY.

THE bill in this case was filed by a shareholder on behalf of himself and all other proprietors of shares in the Eastern Counties Railway, (except such of them as were defendants), who should come in and contribute to the expenses of the suit, against the Company and the directors; and, after stating the act by which the Eastern Counties Railway Company were incorporated, and that a railway had been formed by that Company in conjunction with the Eastern Union Railway Company, from London to a place near Fanningtree, within ten miles of the port of Harwich; and also, that for the purpose of providing communication between that port and different ports on the continent, the directors of the Railway Companies had proposed that a

Dec. 14th,
17th, & 23rd.

The managing directors of a Railway Company, with the view of increasing the traffic on their line, entered into a contract with a Steam Packet Company, that they would guarantee the proprietors of the Steam Packet Company a minimum dividend of £5 per cent. on their paid-up capital until the Company should be

dissolved, and that, upon a dissolution, the whole paid-up capital should be returned to the shareholders in exchange for a transfer of the assets and properties of the Steam Packet Company.

One of the shareholders filed a bill, on behalf of himself and all other shareholders who should contribute, except the directors, against the Company and the directors, and obtained an injunction, ex parte, to restrain the completion of the contract.

Held, on motion to dissolve this injunction, that an objection for want of parties to a suit so framed was not sustainable. That directors have no right to enter into or to pledge the funds of the Company in support of any project not pointed out by their act, although such project may tend to increase the traffic upon the railway, and may be assented to by the majority of the shareholders, and the object of such project may not be against public policy. That acquiescence by shareholders in a project for however long a period affords no presumption that such project is legal.

That an objection, stated by affidavit, and remaining unanswered, that the plaintiff was proceeding at the instigation and request of a rival Company, did not deprive him of his right to a injunction, and the motion to dissolve the injunction was refused with costs.

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joint-stock Company should be formed, to be called the Harwich Steam Packet Company, and that the shares in it should be offered to the holders of shares in those Railway Companies and two other Railway Companies.

That a prospectus of the projected Steam Packet Company was issued in September, 1846, in which nine of the directors of the Eastern Counties Railway, and three of the directors of the Eastern Union Railway Company, were named as forming the body of directors of the Steam Packet Company, stating that arrangements had been made with the two last-mentioned Railway Companies, by which the proprietors of the Steam Packet Company would receive a dividend of not less than £5 per cent. per annum on their subscriptions; and that a copy of the deed of settlement might be inspected at the offices of that Company and of the two Railway Companies.

That a copy of this prospectus, together with a letter making an offer of shares in the Steam Packet Company, was forwarded to each of the shareholders in the Eastern Counties and Eastern Union Railway Companies; and, on the 8th October, 1846, a circular was forwarded from the secretary of the Steam Packet Company to the parties to whom the former circular had been sent in the following terms: "Several inquiries having been made by parties to whom shares in the Harwich Steam Packet Company have been appropriated, as to the exact arrangements which have been made by the Eastern Counties and Eastern Union Railway Companies for the benefit of the proprietors of the Steam Packet Company, I am desired to inform you, that under the contract between this Company and the above two Railway Companies, the latter engage to guarantee, that a minimum dividend of £5 per centum per annum, shall be paid to the proprietors of the Steam Packet Company upon their paid-up capital, until the Company shall be dissolved; and that, upon that dissolution taking place, the whole paid-up capital shall be returned to the shareholders,

in exchange for a transfer of the assets and property of the Steam Packet Company."

That, in October, 1846, the plaintiff called on the secretary to inquire into the nature of the arrangement between the Companies, and was informed that the objects of the proposed arrangement were to convey passengers from London to Rotterdam for certain fares; and that, if it were found necessary, the whole of these fares should be paid over to the Steam Packet Company, in order to declare a dividend to their shareholders of £5 per cent.

That a deed of settlement was prepared for the Steam Packet Company, in which it was provided, that the shareholders in that Company must hold shares in one of the Railway Companies, in order to be entitled to vote at the general meetings of the Steam Packet Company; and also that the Steam Packet Company should be dissolved upon the expression of the desire of the Railway Companies to that effect, and upon their paying or tendering the amount of capital which should be paid up on the shares in the Steam Packet Company, together with interest at £5 per cent.

That many of the shareholders in the Eastern Counties Railway Company had declined to take shares in the Steam Packet Company, and had altogether disapproved of the proposed arrangement between the Railway Companies and the Steam Packet Company; but that several proprietors of shares in the Railway Company had, in consequence of the guarantee of £5 per cent. by that Company, applied for and had shares in the Steam Packet Company allotted to them, and had paid the deposits; and, by the means aforesaid, a considerable sum of money had been received by and was then in the hands of the directors of the Steam Packet Company for the purposes thereof.

That on the 9th of November, 1846, another circular was sent by the secretary of the Steam Packet Company, in which it was stated, that "the deed of settlement had

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been prepared with the greatest care, and entirely protective of the shareholders against all partnership liability, and that the Eastern Counties and Eastern Union Railway directors had approved of the contract between these Companies and the Steam Packet Company, guaranteeing £5 per cent. per annum as a minimum dividend on the Packet Company shares, and further guaranteeing the return of the capital in full in case of the dissolution of that Company."

That up to the date of filing the bill, no contract or agreement had been entered into with the Harwich Steam Packet Company, or with any person or persons on their behalf, under the common seal of the Eastern Counties Railway, or signed by any three directors thereof on behalf of the said Railway Company, or in any other manner, sufficient to render an agreement or contract legally binding upon the Railway Company.

The bill prayed a declaration that it would be a breach of trust on the part of the directors of the Eastern Counties Railway Company to enter into any contract, agreement, or undertaking on behalf of the Eastern Counties Railway Company, to guarantee to the Harwich Steam Packet Company, or to any person or persons on their behalf, any dividend on their capital, or any part thereof, in case of the dissolution of the Steam Packet Company, or in any other event whatsoever, or to apply any funds of the Railway Company in making any payment to the Steam Packet Company, or any shareholders therein, for any of the purposes aforesaid. And that it might also be declared that the directors of the Railway Company were not authorized to make any reduction from their usual rates, tolls, or charges for any passengers or goods passing or being conveyed along the Eastern Counties Railway in favour of any person or persons who, or any goods which, should have been conveyed from Harwich by any steam-packet belonging to the said Steam Packet Company. And that the directors of the Eastern Counties Railway Company might

be restrained by injunction from entering into such proposed arrangements, or any such contract, agreement, or undertaking as aforesaid, and from applying any funds of the said Railway Company in making any payment to the Steam Packet Company, or any shareholders therein, for any of the purposes aforesaid, and also from making any such reduction as aforesaid in any of their usual rates, tolls, or charges, and also from receiving or allowing any clerk, agent, or officer of the Railway Company to receive any sums of money for or in respect or on account of any fare, charge, or other remuneration which might be paid to or charged by the said Steam Packet Company for conveyance of any passengers or goods by any packet boats belonging to the said last-mentioned Company.

On the 19th November, 1846, a special injunction was granted *ex parte* to restrain the defendants, the directors, until the 26th of November, from entering into the proposed agreement with the Steam Packet Company, or any such contract, agreement, or undertaking as was mentioned in the bill, which injunction was afterwards continued till the 14th of December, when the case was argued before the Master of the Rolls upon a motion and a cross motion, the defendants moving to dissolve the injunction, and the plaintiff moving to continue it.

Affidavits were filed by the defendants in support of their motion, in one of which it was deposed by Mr. Roney, the Secretary of the Eastern Counties Railway Company, that it was the general practice for Railway Companies to agree with the proprietors of coaches, omnibuses, and other vehicles for the conveyance of passengers and goods between the various stations on the railways and adjoining places, with a view to increase the traffic on the railways, and that the Railway Companies usually guaranteed to the proprietors of the coaches or omnibuses a per centage of at least £5 per cent., and indemnified them against loss in the use of their vehicles; that the proposed arrangement with the Harwich

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Steam Packet Company would be very beneficial to the Railway Company; that the arrangement had not been agreed to by the shareholders in the Railway Company, nor had it been discussed at any meeting of their shareholders called for that purpose; that there were more than 8,000 shareholders in the Eastern Counties Railway Company; that the plaintiff was a wharfinger, and in that capacity was an agent of the General Steam Navigation Company, and that his solicitors in this suit were the solicitors of that Company, and that the deponent believed that the bill had been filed and the injunction obtained at the instigation and request of the General Steam Navigation Company, who feared that their interests would be injuriously affected by the establishment of the Harwich Steam Packet Company, and not for the purpose of protecting the interests of the shareholders in the Railway Company; that a special general meeting of the shareholders in the Eastern Counties Railway Company had been held on the 12th of November, 1846, and that the chairman of the Company had then stated that nothing would be done to bind the shareholders in the Railway Company to any arrangement with the Steam Packet Company, until such arrangement should have been approved at a special general meeting convened for that purpose, and that the Directors had not, nor ever had, any intention of entering into any such contract without the sanction of the shareholders.

Mr. *Kindersley* and Mr. *Grove*, for the Railway Company.—The real question is, first of all, whether what the railway directors are about to do is any violation of the duty which they owe to the Company or to the plaintiff as a shareholder in that Company. It is the duty, and it is the practice, of every body of directors, with the consent of the shareholders, to do such acts as will generally improve the traffic on the railway. On every railway it is the custom for the directors to contract with

persons having public conveyances to guarantee them £5 per cent. on capital expended by them, and against all losses which they may incur in bringing passengers to the railway. What the Company now propose to do is but an extension of that principle. It is not intended to carry out the intended agreement with the Steam Packet Company, except with the consent of the shareholders in the Railway Company; and if the plaintiff is allowed by this Court, because he happens to have an adverse interest, or an interest which may be prejudicially affected by an agreement, to prevent the directors from entering into a project obviously for the benefit of the majority of the shareholders, it will in effect be enabling the minority to bind the majority. If the act proposed to be done were manifestly against public policy, then the Court would have a right to interfere; but it has no right to interfere with the private management of the railway so as to restrain the directors, with the consent of the shareholders, from employing their capital in any manner they deem most advantageous for the Company. If the Railway Company had a sum in hand, they could certainly employ it in any manner which the directors, with the consent of the shareholders, should be of opinion would be beneficial to the Company; and the principle is not different in this case, where a guarantee or use of the credit of the Company is substituted for the employment of capital.

It appears from the affidavits, that the plaintiff is in fact representing the General Steam Navigation Company, who are afraid that their interest will be affected by the Harwich Steam Packet Company, which is a pretty good proof that the plaintiff must consider the proposed scheme as likely to be beneficial to the latter Company.

This Court never favours parties who do not act bonâ fide, and it will not grant an injunction to protect a person who does not come openly forward to ask the real relief it is his object to obtain.

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This bill is improperly filed by the plaintiff on behalf of himself and all other shareholders except the defendants, because it is said that the bill, on the face of it, shews that certain other shareholders are desirous that the arrangements with the Steam Packet Company should be carried out, and such persons are not in any manner represented; the bill ought to have brought all the parties here, or ought not to have shewn that there was any difference of opinion between them.

Mr. *Turner*, Mr. *Roupell*, and Mr. *Twells* contended, that the case rested upon a principle quite clearly established, viz. that persons who are partners in these Companies have become partners upon the terms and for the purposes mentioned in the act of Parliament, by which such Companies are incorporated. As in private partnerships the acts of the partners are limited and governed by the deed of partnership, so, in public companies, the rights and powers of the directors are entirely governed by the provisions of the act of Parliament, and that act regulates the extent of the trading interests of the Company, and limits them within its provisions. The incorporation of the Railway Company is exclusively confined to the purpose of making and maintaining the railway and other works connected with such railway. The directors have no power, even with the consent of the majority of the shareholders, to embark in any scheme not contemplated by the provisions of their act, just as in private partnerships no majority of the partners can, as against one dissenting partner, alter the contract of partnership entered into by the parties: *Const v. Harris* (a), *Natusch v. Irving* (b). If this Company is permitted

(a) Tu. & Russ. p. 496.

(b) Gow on Partnership, App. p. 404. [Note.—Sir E. Sugden's brief in this case was produced by Mr. Turner, whereby it appeared

that "Mr. Rothschild denied in his affidavit, filed in opposition to a motion for an injunction, that the plaintiff had stated to him in strong or any terms his opinion

ry its speculations to a port beyond the sea, there is
g to prevent its connecting itself with all the railways
; Continent which may contribute to its traffic by
ng passengers to that port.

to the objection to the frame of this bill, on the
l that the assenting shareholders were not represented,
contended, that, if every shareholder but one were
as of entering into an arrangement which was not
the powers of their act, such one would have a right
vent such an arrangement being carried into effect.
egal contract has been entered into by and between
shareholders, and by law they are all bound by that
ct; the mere circumstance that some of the share-
s assert a right, inconsistent with that contract, can
render it incumbent on a plaintiff on this account to
them parties to the suit. In suits for the admini-
n of estates, it has never been held, that, if an exe-
refuse to transfer, upon the ground that a certain per-
s made a claim against him, such person is a neces-
erty. All that the Court looks to, is, whether the
before the Court, in the character of trustees, can
it, that they have a legal right to contest the ques-
It is no more necessary to bring a dissentient share-

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danger or impolicy of a
xck company undertaking
f marine insurance ; and
did not believe that many
of the shareholders dis-
from the Company carry-
such business, on the
and for the reason stated
ill ; and deponent had no
bat this was a party ques-
d that the plaintiff had
nself to the views of the
interested in opposing
pany, being indemnified
n against all costs and

charges." And it further ap-
peared, that, on the 4th Novem-
ber, 1824, an injunction was or-
dered by Lord Eldon to restrain
the defendants, the president and
directors of the Alliance Com-
pany, from effecting any manner
of marine assurances whatsoever,
or from transacting in any manner
the business of underwriting or
insuring ships, or their goods, or
freight, against the perils of the
sea, and from lending money on
bottomry in the name or on ac-
count of the Alliance Company.]

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holder before the Court, than it would be in the case of a party claiming the residue of an estate under a will in which his title would be clear but for the claim of an uncertificated bankrupt, to bring that uncertificated bankrupt before the Court. If, instead of enjoining the directors from entering into an unauthorised scheme, it were now a question of recovering a sum of money improperly applied by the directors, the Court would not require every individual shareholder to be parties to such a bill; and if they would not in such a case be necessary parties, they cannot be so in a bill filed for restraining an act which is preliminary to such a proceeding: *Richardson v. Hastings* (a), *Walkworth v. Holt* (b).

The objection that the plaintiff in this case is in fact representing the General Steam Navigation Company, ought to have no weight with the Court as against his legal rights. The right of an individual should not be sacrificed because he has not the means of prosecuting a suit without the assistance of some other party.

His Lordship referred to the case of *Harrington v. Long* (c).

Mr. *Kindersley* replied.

THE MASTER OF THE ROLLS.—This is a motion to dissolve an injunction granted by me *ex parte* to restrain the defendants from entering into a particular agreement with a Company, or intended Company, to be called the Harwich Steam Packet Company. Three sorts of reasons have been offered to induce me to do this; one is personal to the plaintiff, which I may dispose of at once by saying, that, looking at the affidavit of Mr. Roney, I am of opinion that there is not upon that affidavit sufficient ground for me to

(a) 7 Beav. 323.

(b) 4 My. & Cr. 619.

(c) 2 My. & K. 590.

say that the plaintiff has not a right to ask for an injunction if the merits of this case enable him to do so. The next is, as to the form of the pleadings—the way in which the case has been brought forward. That objection is of such a nature, that I do not think I should be right in coming to a conclusion upon it without carefully examining for myself the frame of the record, which I certainly will do if the parties desire it. The other ground alleged for this motion is upon the merits; and, after the discussion which has been entered into, and considering the great and extensive importance which belongs to it, I think I ought not to abstain from giving my opinion, which it has occurred to me right to form, upon this point.

There are no doubt four parties to be considered in this case. There are, the plaintiff, the defendants the Eastern Counties Railway Company, and another Railway Company connected with it, called the Eastern Union Railway Company, and a Company or proposed Company called the Harwich Steam Packet Company. The plaintiff is a shareholder in the Eastern Counties Railway Company, and has no interest whatever except in that Company, and is exposed to no liabilities except such as are incurred in carrying on the business of that Company. Now, Companies of this kind, with powers so extensive, are so recently introduced into this country, that I believe neither the Legislature nor Courts of justice have yet been enabled to understand all the different lights in which their transactions ought properly to be viewed. We must, however, adhere to ancient general settled principles, so far as they can be applied to great combinations and companies of this kind—joint-stock companies getting possession of sums so extremely large, exercising powers so extensive, so materially affecting the rights and interests of a great variety of other persons, and what must, perhaps, everywhere be considered of still greater importance, affecting the rights of the public,—the rights which the subjects of Her Majesty are

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accustomed to enjoy under the protection of the laws established in this kingdom.

To look upon a Railway Company in the light of a common partnership, and as subject to no greater vigilance than common partnerships may be, would, I think, be greatly to mistake the functions which they perform and the powers of interference which they exercise with the public and private rights of all individuals in this realm. We are to look upon those powers as given to them in consideration of a benefit, which, notwithstanding all other sacrifices, is on the whole hoped to be obtained by the public; but the public interest being to protect the private rights of all individuals, and to save them from liabilities beyond those which the powers given by the several acts necessarily occasion, those private rights must always be carefully looked to.

I am clearly of opinion that the powers given by an act of Parliament like that which is now in question, extend no further than expressly stated in the act, except where they are necessarily and properly acquired for the purposes which the act has sanctioned. How far those powers may extend which are necessarily or conveniently to be exercised for the purposes intended by the act, will very often be a subject of great difficulty. We cannot always ascertain what they are: ample powers are given for the purpose of constructing the railway; ample powers are given for the purpose of maintaining the railway; ample powers are also given for the purpose of doing all those things which are required for the proper use of the railway: but I apprehend that it has nowhere been stated that Railway Companies have power to enter into transactions of all sorts and to any extent. Indeed, it is admitted, and very properly admitted, that they have not a right to enter into new trades and new businesses not pointed out by the act: but, it is contended, that they have a right to pledge the funds of the Company without any limit, for the encouragement

of other transactions, however various and extensive, provided only they profess that the object of the liability occasioned to their own shareholders by such encouragement, is to increase the traffic upon the railway, and thereby the profit to the shareholders. Surely that has nowhere been stated; there is no authority for anything of that kind. What has been stated is, that these things to a small extent have frequently been done since the establishment of railways. Be it so; but unless what has been done can be proved to be in conformity with the powers given by the special acts of Parliament, they do not in my opinion furnish any authority whatever. To suppose that the acquiescence of railway shareholders for the last fifteen years in any transaction conducted by a Railway Company is any evidence whatever of their having a lawful right to enter into it, is, I think, wholly to forget the frenzy in which the country has been for the last fifteen or sixteen years, or thereabout. There is no project, however wild, which has not been encouraged by some one or more of these Companies. There is no project, however wild, which the shareholders, or the persons liable in respect of those Companies, have not acquiesced in from one cause or another, either from cupidity and the hope of gaining extraordinary profits beyond their first anticipations, or from terror of entering into a contest with persons so powerful. In the absence of legal decisions, I look upon the acquiescence of shareholders in these transactions as affording no ground whatever for the presumption that they may be in themselves legal.

Looking at this transaction, I am far from saying, that what is proposed to be done might not be extremely profitable to this Company. I am far from expressing the least opinion that the establishment of a Steam Packet Company at Harwich, communicating with this railway, might not only be of public, but what in common parlance may be thought still more extensive, of national importance. I am

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far from saying, that it might not be in the highest degree proper to give this Company authority to do that which they are now attempting to do, as it seems to me, without authority. I mean to express no opinion upon that whatever. But what they are doing is this. Under the powers of this particular act of Parliament, which enables them to do what is required for the construction, for the support and maintenance, and for the proper and convenient use of this railway, they are proposing to pledge the funds of this Company, however large they may be, (it is said they are millions, —four millions: seven millions have been stated to me; I have looked only to the first act of Parliament, and that gives them authority to raise £1,600,000, which is stated, probably with perfect truth, to have been subsequently extended to the extent of £150,000, or even to £300,000), for the purpose of supporting the proposed Harwich Steam Packet Company.

The agreement is of this nature. To certain individuals a proposition is made—"Do you establish a Steam Packet Company from Harwich to the Northern ports, and we will do all that we can to encourage the shareholders in the Railway Company to become shareholders in the Steam Packet Company." That might be a very legitimate and proper mode of encouragement, because it is done at the expense and at the risk of each individual who makes his own choice. But besides this, it is proposed that, whatever may be the success of the Steam Packet Company, if it should fail, however greatly, nobody shall subscribe to it without its being provided, that, out of the funds of the Railway Company, interest to the extent of £5 per cent. shall be paid upon his subscription; and, moreover, if it should fail altogether, so that it would be proper to put an end to it, the funds of the Railway Company shall be pledged to pay back to any subscriber to the Steam Packet Company the full amount of his subscription.

Now, it is not proposed that the Railway Company shall

mediately, and by their own directors, engage in the Steam Packet Company, and carry on the trade; that is a part of the agreement, as it has been stated to me; very possibly might be a part of the agreement otherwise arranged, but that is not now proposed; it is proved only that they shall have the whole risk and liability of paying interest at £5 per cent.; and if the transaction should turn out an unprofitable one, the making good any subscriber towards it the full amount which he has paid.

Now, is there anything which can be considered as authorising that course in any part of this act of Parliament? To construct, to maintain, to regulate the traffic, do all that is necessary for the purpose of carrying on the traffic, does that imply that they are to pledge the funds of the Company for a completely different transaction, in the hope that it may turn out a profitable one, and, by being itself profitable, add to the profits of the Railway Company? Surely there is nothing in the powers which are given by this act of Parliament to enable the Railway Company to do that. It is stated that I must either allow this to be done, or that I must allow that nothing can be done that is at all out of the express words of the act of Parliament. Now, I am certainly of opinion, until I know otherwise to be decided otherwise by higher authority, (which, in matters of such great importance as this, will probably be decided either in this or in some other case), that what is now proposed to be done is not within the powers given by the act of Parliament. When another case is brought before the Court, that case will be judged of by the circumstances which attend it; but I am not afraid to say, that, in any case, however small, coming within the principle of this act, no company has a right to pledge the funds of that Company for the purpose of supporting another which is engaged in hazardous speculation. At the same time, I am far from saying that there are not many small things of this sort

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which are extremely obvious, and might be so extremely beneficial, that when all the shareholders knew them they would all acquiesce in, and never think of complaining of them. Therefore, it does not follow that they cannot do any, the least thing. I believe they have the power to do all such things as are necessary and proper for the purpose of carrying out the intention of the act of Parliament, and they have no power to do anything beyond it.

I do not mean to enter into a discussion about public policy here, but still one cannot fail to observe, that, if there is any one thing which is more desirable than another, after providing for the safety of all persons who travel upon railways, it is this, that the property invested in Railway Companies should itself be safe; that a railway investment should not be considered nor be, a wild speculation, exposing those who are engaged in it to all sorts of risks, whether they intend it or not; but considering the vast property which is invested in railways, and easily transferable, perhaps one of the best things that could happen to them would be, that the investment should be of such a safe nature that prudent persons might, without improper hazard, employ their monies in it. Quite sure am I, that nothing of that kind can be attained if Railway Companies should actually be left at liberty to pledge their funds in support of plausible speculations, which, with however great a probability of advantage, may very possibly, (to say the least), lead to extraordinary losses on the part of the Railway Company.

I now say, as I said at first, I consider this to be a question of great importance, not merely to the Railway Companies who claim these powers, but of great importance to the public in a great variety of ways, more indeed than it is necessary for me even to refer to on this occasion.

I say, therefore, that, subject to the examination which I shall feel it my duty to give to the pleadings before me, I shall not dissolve this injunction. If I find that the pleadings are improperly framed, then I think the case ought to

be brought forward in another form—there ought to be a demurrer. I do not know whether the defendants would be disposed to file a demurrer, in order that the question might be discussed upon it, but the granting or continuing the injunction, if such an objection as that which is made be real, would not, of course, deprive the defendants of their right to demur.

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The case of *Preston v. The Grand Collier Dock Company* (a), *Bromley v. Smith* (b), *Richardson v. Larpent* (c), were cited in support of the frame of the bill; and on the 23rd of December, his Lordship held, that the pleadings were correct, and that the injunction must be continued.

The case was afterwards (23rd of January, 1847), mentioned to the Court, on behalf of the defendants, when his Lordship stated, that the injunction was only meant to refer to the guarantee proposed to be given, and the case made by the bill; but was not intended to affect any arrangement which the directors might enter into with any Steam Packet Company respecting the rates and tolls to be charged on the railway.

(a) Antè, Vol. 2, p. 335; S.C., 11 Sim. 327.

(b) 1 Sim. 8.

(c) 2 Yo. & Coll. C. C. 507.

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BEFORE V. C. WIGRAM.

LETTS v. The BLACKWALL RAILWAY COMPANY.

Jan. 12th,
30th.
Feb. 9th, 20th.

Under "The Act for Tithes in London," (37 Hen. 8, c. 12), the plaintiff, rector of St. O., was entitled to claim 2s. 9d. in the pound upon the rent reserved in lieu of tithes on all houses in his parish. A Railway Company, under the powers of their acts, purchased and took thirty-three of the houses in the said parish, being bound, by the 33rd section of one of their acts, to pay such yearly sums in respect of such houses, "according to the last assessments thereof, to the 25th March last," as would be equal to the loss in tithes which the rector might sustain for want of occupiers by reason of such taking:—

THE bill in this cause was filed by the Rector of St. Olave, Hart-street, in the city of London, and stated a decree made by the then Archbishop of Canterbury, and other persons, bearing date the 24th February, 1545, to which the authority of an act of Parliament (37 Hen. 8, c. 12) was given, intitled "An Act for Tithes in London," whereby it was provided, "That the citizens and inhabitants of the said city of London, and liberties of the same for the time being, shall yearly, without fraud or covin, for ever pay their tithes to the parsons, vicars, and curates of the said city, and their successors for the time being, after the rate hereafter following, that is, to wit, of every 10s. rent by the year of all and every house and houses, shops, warehouses, cellars, stables, and every of them within the said city and liberty of the same, 1s. 4½d.; and of every 20s. rent by the year of all and every such house and houses, shops, warehouses, cellars, and stables, and any of them within the said city and liberties, 2s. 9d.; and so above the rent of 20s. by the year, ascending from 10s. to 10s. according to the rate aforesaid. Item: That, where any lease is or shall be made of any dwelling-house or houses, shops, warehouses, cellars, or stables, or any of them, by fraud or covin, reserving less rent than hath been accustomed, or is, or that any such lease shall be made without any rent reserved upon the same by reason of any fine or income paid beforehand, or by any other fraud or covin, that then

Held, that the assessment mentioned in the Railway Act does not necessarily mean the assessment to the relief of the poor, but refers to the annual charge which the rector had made at the time mentioned in the act in respect of the annual value of the house as fixed by agreement or otherwise between himself and the occupier.

That the right of the rector to claim tithes was not limited to the amount of the annual value which, at the time of taking, was payable in respect of the houses so taken; but in the event of the Company rebuilding houses producing a larger rental than those they had originally taken, such houses would be liable to a new assessment.

That where no agreed annual value existed, the sum received by the rector for tithes must be presumed to be taken on the real annual value.

in every such case the tenant or farmer, tenants and farmers thereof, shall pay for his or their tithes of the same after the rate aforesaid, according to the quality of such rent or rents as the same house or houses, shops, warehouses, cellars, or stables, or any of them, were last letten for, without fraud or covin, before the making of such lease. Item: That every owner or owners, inheritor or inheritors, of any dwelling-house or houses, shops, warehouses, cellars, or stables, or any of them, within the said city and liberties, inhabiting or occupying the same himself or themselves, shall pay after such rate or tithes as is above said, after the quantity of such yearly rent as the same was last letten for, without fraud or covin."

The bill then proceeded to state, that, according to the true construction of such decree, the plaintiff was entitled to receive 2s. 9d. in the pound for tithes upon the annual value of all houses, shops, warehouses, cellars, &c., situate within the said parish; and he had actually received payments after that rate in respect of divers premises, while in respect of other premises he had from time to time wholly or partially remitted such payments.

That, previously to the induction of the plaintiff, the annual value of the titheable premises in the parish had been assessed by agreement between the successive rectors and the inhabitants or occupiers, and plaintiff had adopted the last assessment so made, and continued to collect his tithes thereon, until a change in occupation took place, whereupon the value of the premises was assessed by agreement, and the tithes collected upon such new assessment; and in making such assessment the amount at which the premises were assessed to the poor's rate was generally resorted to by the plaintiff.

That by certain acts (7 Will. 4, 1 Vict. and 2 & 3 Vict. c. xcv), the Blackwall Railway Company was incorporated, and by the 33rd section of the last-mentioned act, which received the royal assent in August, 1839, it was

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provided (sect. 33), that for indemnifying (among others) the rector of St. Olave, Hart-street, his successors, heirs, and assigns, against such loss as might otherwise accrue to them from the Railway Company taking down under the powers of their acts any houses or other buildings, after the occupier or occupiers of any of the houses or other buildings to be taken down should have quitted possession thereof, and in the meantime and until new houses and other buildings should be erected, completed, and occupied on the ground which should be cleared under any of the provisions of the act now in statement, or the other acts thereinbefore mentioned, within the said parishes, any or either of them, or on some part thereof, of such an annual rent or value that the tithes or yearly sums of money by way or in lieu of tithes for the time being actually payable for such new houses or other buildings, should be fully equal to the tithes or yearly sums of money by way or in lieu of tithes payable for the houses or other buildings so for the time being quitted by the occupiers thereof as aforesaid within the said parishes, or any or either of them, the tithes or yearly sums of money, or customary payments in lieu of tithes, payable in respect of the houses or other buildings within the said parishes, any or either of them, which should be so quitted as aforesaid, according to the last assessments thereof, to the 25th day of March then last, or annual sums of money equal to the loss in tithes, or sums of money or customary payments in lieu of tithes, which said rectors and impropriators, their respective successors, heirs, or assigns, might sustain by the want of occupiers in or by the taking down of such houses or other buildings respectively estimated as aforesaid, should be paid and payable to the said several rectors and impropriators, their respective successors, heirs, and assigns, out of the monies to be applied for the purposes of the said acts, clear of all taxes and deductions, on certain days therein mentioned, the first payment to be made on such of the said days as should first and next

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happen after the occupier or occupiers of any such houses or other buildings in said parishes, any or either of them, should have quitted the same; and such sum and sums of money to be paid and made good, should diminish in proportion to the tithes or yearly sums of money by way or in lieu of tithes which should for the time being be actually payable for new houses or other buildings erected, completed, and occupied on ground which should be so cleared within the said parishes.

That the Railway Company, under the powers of their acts, had taken thirty-three houses in the parish of St. Olave.

That the assessment for the poor's rate was the only public and general assessment made of the annual value of the houses, &c. in the city of London, and that it regulated all other rates.

[The bill then set out the value of the premises taken by the Company according to the poor's-rate assessment.]

That the value of the said premises, as assessed by agreement between the rector and occupier, exceeded the poor's-rate assessment, but the plaintiff in his claims had adopted the poor's-rate assessment.

The bill prayed a declaration, that the plaintiff and his successors were entitled to tithes after the rate of 2s. 9d. in the pound, on the annual value of the premises taken by the Railway Company, according to the last assessments made thereof respectively, up to the 25th of March, 1839, by agreement between the rector and occupier, or else according to the last assessments to the poor's rate, subject to deduction in respect of houses, or parts of houses, left standing, and in respect of new houses which should thereafter be erected and occupied on the ground cleared by the Railway Company; and it also prayed a reference as to the amount of tithes to which the plaintiff was entitled under the declaration, and directions for payment; and in case it should appear that the warehouses, &c., constructed by the Rail-

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way Company, on the ground cleared by them, were to be considered as titheable premises, and that the compensation for the loss of tithes had wholly, or in part, determined, then the bill prayed a declaration, that, in addition to such part of the compensation, if any, as had not determined, the plaintiff was entitled to tithes after the rate of 2s. 9d. in the pound, on the annual value of such warehouses, &c., and also a reference as to the value, and directions for payment.

The defendants filed a cross bill against the plaintiff in the first suit, for the purpose of discovery, and praying a declaration that the defendant, the rector, was only entitled to demand tithes after such rate, and upon such value of the several premises as might have been agreed upon by the rectors of St. Olave and the defendant in particular, or after such rate and upon such value as the several premises might, in the terms of the act, (2 & 3 Vict.), have been assessed to the 25th of March, 1839, or of such annual sum as might be equal to the aggregate loss in tithes, or customary payments in lieu of tithes, in respect of the premises, which the defendant might have sustained by the want of occupiers of, or by the taking down the said premises; such payments always diminishing in proportion to the tithes which should be payable in respect of new houses erected by the plaintiffs.

The two causes now came on for hearing (a).

Mr. *Romilly* and Mr. *P. White*, for the plaintiff in the original suit.—The defendants, the Railway Company, pretend that they are only to pay in respect of tithes just such a sum of money as the rector has received; and that if the rector has, for the sake of peace, and as an act of generosity, remitted the amount of tithes to which he is legally entitled, this Court is to compel him to continue such act

(a) The material facts in the evidence and answers are sufficiently stated in the judgment.

of generosity in their favour, to the prejudice not only of his own interests, but those of his successors. The act refers to no special mode of assessment; but as the assessment to the poor's rate is the most usual, and, in fact, the only one resorted to in all cases by the Government, it ought to be adopted in this case. "Assessment" means, practically, the imposition of a tax on a body of persons which is taken rateably from each of them.

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Mr. *Wood*, and Mr. *J. S. Bell*, for the defendants, the Company.—There are two elements in every act of assessment; first, the fixing the amount of rent; and, secondly, the sum to be levied in respect of the rent when determined. The assessment referred to by the act must mean the amount which the collector received at the time referred to by the act in respect of rents, the amount of which he had previously determined; it cannot by implication, and without express reference, mean the poor's rate; in order to make that the standard, it ought to have been particularly referred to. If the rector is now held to be entitled to 2s. 9d. in the pound, the Court will give him more than the last assessment, and, consequently, more than he is entitled to by the Railway Act. The defendants are, at all events, entitled to the costs of the cross bill, as it was only by means of it that they obtained the information they required as to the sums actually claimed and received by the rector.

[The counsel on both sides said, it was the wish of the parties that the question should be determined in this Court without a case at law.]

The VICE-CHANCELLOR.—Having been requested by the counsel in this cause to state my opinion on the construction of this act, I will do so; but I think it right to say, that I am willing to give either party, if they desire it, a case for the opinion of a Court of law. [His Honor then

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stated the circumstances of the case, and read the section of the act hereinbefore set out, and then proceeded to give judgment as follows] :—

The first question I shall consider is, what is meant by that word “assessments” in the act of Parliament. The plaintiff, I should state, has not proved any actual assessment upon any of the houses, except those occupied by the Trinity Company, the East and West India Dock Company, the Commercial Sale Room, and the Excise Office, in Crutched Friars, about which there is no dispute, as I understand it, and also upon four houses, which I shall presently specify, as to which four houses there was a change of occupation, and upon which there was, according to the evidence of Mr. Smith, an agreement come to as to the annual value of the houses. Now, the plaintiff has argued that the word “assessments” refers in construction to the assessment to the relief of the poor, as the means of measuring the annual value; and that the 2s. 9d. in the pound ought to be calculated upon that assessment in the case of each of the houses taken by the Company. To that argument, I cannot assent, unless there is nothing else in the nature of an assessment relating to the tithes by which the word “assessments” in the act of Parliament can be reasonably satisfied. Now, it appears to me, that that is not the state in which this case is found; but, on the contrary, that there existed before and at the time this act of Parliament passed, something to which the Legislature must have intended to refer by the word “assessments.”

By the decree of 1545, a fixed and uniform sum of 2s. 9d. in the pound was payable on the annual value of all the houses in the parish. The charge, therefore, to which each occupier was liable, depended upon the annual value of his house, and when that annual value was determined by agreement or otherwise (for I do not rely on the fact of there having been agreements, but when the annual value of the house was determined by agreement or otherwise, as

it must have been, to enable the rector to claim anything,) the amount of the charge so determined would answer the word "assessments" in the act of Parliament with sufficient accuracy to satisfy me that that is what was meant by the use of that word in the act; and I should not be justified in saying, that, because there happens to be an assessment to the relief of the poor, which appears to be a convenient mode of ascertaining it, that was the thing intended by the act. If there had existed, in writing, an agreed actual value of all the houses in the parish, and 2s. 9d. had been charged upon it, no one would, I think, question the conclusion I have come to; and so far, I entertain no doubt. I do not, however, mean to say that an agreement between the parties to take the poor-rate as an evidence of the actual value of the houses might not have been perfectly binding between the parties.

The next question is one of more difficulty. The collector is examined. The collector's books, and also some receipts signed by him for the annual sums collected by him for the use of the rector, are produced. It is proved in the cause (taking the evidence to be credible) that as to the premises above mentioned of the Trinity Company, and the other houses, 2s. 9d. in the pound was collected upon the agreed annual value of the houses. It is also proved, that as to four of the houses taken by the Company, the rector and the occupier had come to an agreement, which agreement was subsisting on Lady-day, 1839, as to the annual value of four houses, 42 and 45 in Crutched Friars, and 2 and 3 in Cooper's-row.

An observation occurs upon this which I will just make in passing, it is this: The bill alleges, that wherever there was a change of occupation there was a new agreement come to between the parties. The bill does not specify particularly these four houses; and although Mr. Smith's evidence is precise upon the point, it might be a question (I do not mean to decide it now) whether the defendants

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might not be entitled to an inquiry upon this point. But the defendants file a cross bill against the plaintiff, and the plaintiff, in answer to the interrogatories contained in that bill, specified these four houses as houses upon which this agreement had been come to. There being a general allegation of this agreement, the evidence of Mr. Smith would be admissible under it; and as the cross bill has given the defendants information as to these particular houses, it does not appear to me that the case is in that respect in any difficulty about the evidence. Upon these four houses Mr. S. says, that by the direction of the rector he collected less than 2*s.* 9*d.*; and the same, according to his evidence, is true with respect to all the other houses, except those paying the 2*s.* 9*d.* as above, and except also the collector's own house; and except also the houses of very poor and indigent persons. He says that this was done in order to preserve harmony and good-will in the parish; and he says there was no agreement whatever between the rector and the occupiers, whereby the rector was precluded from demanding the full sum of 2*s.* 9*d.* in the pound.

In each case the rector's books have been produced, and those books shew what sums, being less than 2*s.* 9*d.* in the pound on the annual value, were collected up to the time when the houses were taken by the Company. The defendants have contended that the sums appearing by the rector's books to have been demanded and paid are to be taken as the "assessments" mentioned in the act of Parliament. Now, I do not agree with that argument. First, take the case of the four houses as to which the annual value was agreed upon, why should not the rector be allowed to claim his 2*s.* 9*d.* upon those as against the Company, the agreement as to the annual value being proved, the 2*s.* 9*d.* being given, and the reason for remitting the difference being also proved?

I pointed out, during the argument, what appeared to me to be the difficulties in the way of the defendants' argu-

ent; for I remarked, that if this part of the argument were right, the defendants might build less than the number of houses, but of the same annual value as those they have taken, and might require the rector, according to the terms of the act of Parliament, to exact the full sum of 2*s.* 9*d.* in the pound upon the annual value of the houses so then built, and might tell him that his claim upon the Company was satisfied so soon as the aggregate amount of 2*s.* 9*d.* to be exacted upon those newly built houses shall equal the amount of the annual sums (less than 2*s.* 9*d.* in the pound) which, by reason of his indulgence, in truth, he had been in the habit of collecting. Suppose, in order to explain this, that one of those schemes which I see are still agitated, was to receive the sanction of the Legislature,—I mean the scheme for making a great central metropolitan station; and suppose that a large part, I will say half of this parish was to be taken, and I will suppose the clergyman to have been accustomed to take half his due on those houses. If the argument of the defendants were to prevail, the consequence would be this, that the Company having pulled down half the houses in the parish, might rebuild half the number of houses they had taken, of the same annual value as the houses pulled down, and they might then tell the rector to charge his 2*s.* 9*d.* on the diminished number of houses, and contend, that, by exacting his full due on half the number of houses, he was no sufferer, because he obtained the same annual income as he had done before, for the sake of preserving harmony in the parish. I give entire credit to Mr. Smith's evidence on that point, because it falls so entirely with the nature of the resistance which unfortunately is so often made to the claims of the clergy, and their concessions for the sake of peace and good-will.

I must observe, in confirmation of this, that, in fact, the Legislature, in that long clause in parenthesis, (commencing with the words "And in the meantime," &c., and ending with the words "within the said parishes, or any or

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either of them,") and, indeed, the argument of the defendants, treat the 2s. 9d. as the due of the rector, in favour of the Company, who may oblige him to exact that sum from others, and yet I am now asked to reject that same view in favour of the Company, on the interpretation of the word "assessments." It does not appear to me, that the defendants' interpretation of that word would answer the object of the Legislature, which was to indemnify the rector against loss.

One other argument I have to notice, and one only on this part of the case ;—certain receipts have been produced, signed by the collector, (who represented the rector), which were given by him to persons who had paid their dues, and these receipts purport to be for *sums due*, and if literal effect be given to the words, it would appear as if those were the sums assessed according to law, and that the rector was, by agreement, precluded from demanding more than these sums. I must observe, in point of evidence, that these are mere printed receipts—mere common forms; and I must consider further, that this argument goes directly to contradict the testimony given by Mr. Smith. It does not appear to me, that the receipts in the common form can be taken to countervail that evidence, about which there seems no ground for question.

As far as the case applies to the four houses, the value of which, Mr. Smith says, had been determined by agreement, supposing that evidence to be satisfactory, (I do not say at present whether I am satisfied or not, if any inquiry is asked), it appears to me that the plaintiff has a right to have it considered that 2s. 9d. in the pound was the sum actually due on those houses. With respect to the other houses, as to which no annual value has been proved, it appears to me that I must, as to them, say that there has been no assessment, or I must presume that the sums actually collected represent the proper assessments.

As I before said, looking at the evidence of Mr. Smith, I

think (although not in perfect harmony with that evidence) I may take it, that there was an agreed annual value; that that agreed annual value cannot now be proved, and that the sums actually collected must be taken for this purpose to be the sums due according to the agreement. They are really less; and, therefore, in that respect, I can do no injury to the others. Upon these several points, if the parties like a case, they may have it.

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On the 9th and 20th of February, the case was again mentioned; when his Honor finally settled the minutes in manner following:—

DECLARE, that the Rev. J. Letts, the plaintiff in the first-mentioned cause, is entitled (subject to the deductions hereinafter mentioned) to be paid tithes after the rate of 2s. 9d. in the pound on the annual values of houses and other buildings taken by the defendants, the London and Blackwall Railway Company, as such annual values had been agreed on between the rector for the time being of the parish of St. Olave, and the respective occupiers for the time last before Lady-day, 1839, and let it be referred to the Master, &c., to inquire and state to the Court what houses and other buildings have been taken by the defendants, the London and Blackwall Railway Company, and the annual value thereof respectively, according to such last agreements as aforesaid; and in case as to any of the said houses and other buildings no such agreement as aforesaid shall be proved to have been entered into, then as to each of such last-mentioned houses and buildings, let the said Master take the annual sum last collected by way of tithe thereon, as representing 2s. 9d. in the pound on the annual value thereof; and let the said Master take an account of what is due to the plaintiff, the Rev. J. Letts, from the said Railway Company for tithes, having regard to the declaration and inquiries aforesaid; and let the said Master also take an account of all sums received by the plaintiff from the defendants or any other persons for tithes, in respect of any and which of the houses or buildings so taken as aforesaid since they were so taken, or in respect of any and what new houses or buildings erected by the said defendants on the site thereof; and let the said Master deduct the amount of the sums so received from what he shall find due for tithes, and state the balance; and let the said defendants pay such balance to the plaintiff within fourteen days from the date of the said Master's report;—Usual directions. Liberty to apply.

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COURT OF COMMON PLEAS.

*In Easter Term, 1847.**May 8th.*

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Certain persons issued a prospectus for a railway company, stating the capital to be £3,000,000, in 120,000 shares, of £25 each; and that, in case Parliament should not sanction the undertaking, the money deposited,

ASSUMPSIT for money had and received. Plea, non assumpsit. The cause was tried before *Erle, J.*, at the sittings in Middlesex after Trinity Term, 1846, when the jury found a verdict for the plaintiff; and *Fitzherbert*, in the following Michaelmas Term, obtained a rule nisi for a new trial, or for entering a nonsuit or verdict for defendant.

The facts of the case are fully detailed in the judgment, in which will also be found the nature of the arguments on the main points.

minus the expenses attending the projection, would be returned. The plaintiff sent a letter of application for shares in the form given by the prospectus. To this letter he received a written answer, allotting him sixty shares, but conditionally upon the deposit being paid before a certain day, in default of which the shares would be forfeited. Prior to the day fixed for payment of the deposit, the committee published an advertisement giving notice that they had completed the allotment, and stating, by way of apology to disappointed applicants, that they had been obliged to give a preference to those locally interested. Evidence was given that the plaintiff saw this advertisement, and that he subsequently paid his deposit. Notwithstanding that applications had been made for 120,000 shares, 58,000 only were allotted. Afterwards the plaintiff executed the subscription-deed, which gave power to the committee to pay the expenses out of the deposits. The plaintiff attended a meeting of shareholders on the 15th of December. The deposits, except £400, being expended, and there being no funds for making the necessary parliamentary deposit, a resolution was proposed for a further allotment of shares. The plaintiff objected, and moved, as an amendment, that the deposits should be returned. This amendment the chairman did not put to the meeting. The undertaking was afterwards abandoned. The plaintiff brought an action against one of the managing committee to recover the money he had paid as a deposit on the shares allotted to him.

Held, First, That there was no contract binding on the plaintiff, the allotment being in a company having a less capital than that in which shares were applied for, and the letter of allotment also being conditional, and not a simple acceptance of the plaintiff's proposal.

Secondly, That the evidence warranted the jury in finding that there was a fraudulent misrepresentation by the advertisement, and that the representation so made was a material inducement to the plaintiff to pay his money; consequently, that the subscription-deed was no answer to the action.

Thirdly, That, notwithstanding the plaintiff's attendance at the meeting of the 15th of December, he was in a condition to maintain the present action.

Fourthly, That the absence of any opinion by the judge at the trial, whether the notice of application and allotment did or did not constitute a binding contract, was no ground for a new trial, that being a question of law for the Court, and not of fact for the jury.

and *J. Brown*, shewed cause (*a*), and cited the cases, contending that the money was paid on a misrepresentation; *Pope v. Wray* (*b*); *Polhill v. Wright* (*c*). That the contract for shares was not binding *v. Eyre* (*d*); *Routledge v. Grant* (*e*); *Fox v. Henderson* (*f*); *Pitchford v. Davis* (*g*); *Flight v. Booth* (*h*); *Wright v. M'Morine* (*i*); *Mortimer v. M'Callan* (*k*); *Smith v. Lister* (*l*); *Lawton v. Hickman* (*m*); Sugden's "Cases on Shares and Purchasers" (*n*); *Smith v. Salmon* (*o*); *Newhall v. Martin* (*p*); *Martindale v. Smith* (*q*); *Greaves v. Baker* (*r*). That money advanced towards a project subsequently been abandoned, may be recovered with deduction of any part for the payment of the expenses; *Nockels v. Crosby* (*s*); *Fox v. Clifft* (*t*); *Clifft v. Spottiswoode* (*u*).

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Kelly, Channell, Serjt., and Fitzherbert, contra, that the plaintiff had entered into a special contract, the true nature of which he became bound to pay the debt, the payment was to be ascribed to that contract, and not to the false representation; that there was no introduction of new terms into the contract by the letter of application being for shares, "subject to the regulations of the Company." [*Wilde, C. J.*—What are to be taken into consideration by the "regulations of the Company" but

the 1st. Before	(<i>k</i>) 6 M. & W. 58.
<i>Coltman, J., Cresswell</i>	(<i>l</i>) 15 M. & W. 121.
<i>Williams, J.</i>	(<i>m</i>) 10 Jur. 543.
2 W. 451.	(<i>n</i>) Vol. 1, p. 165, ed. 10.
Ad. 114.	(<i>o</i>) 9 B. & C. 561.
S. 194.	(<i>p</i>) 15 M. & W. 308.
3. 653.	(<i>q</i>) 1 Q. B. 389.
g. 776.	(<i>r</i>) 3 Camp. 426.
4 W. 2.	(<i>s</i>) 3 B. & C. 814.
5. N. C. 370.	(<i>t</i>) 6 Bing. 776.
Vol. 2, p. 51.	(<i>u</i>) Ante, p. 321.

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those set forth in the prospectus? Of what use is your prospectus but to give the public your regulations? "Subject to the regulations of the Company" must mean subject to the regulations they may make from time to time in the allotment of shares. It must mean "what regulations we think proper." [*Cresswell, J.*—I do not find that here, in the contract.] That in cases of contract the representation must be shewn to be false, that defendant knew it, and that plaintiff was thereby induced to contract; *Shrewsbury v. Blount* (a); *Taylor v. Ashton* (b); *Moens v. Heyworth* (c). That plaintiff ought to have sued upon the subscription deed, and not on the simple contract; *Edwards v. Bates* (d). That plaintiff, by acting as a shareholder, and dealing with the shares as his own subsequent to discovery of fraud, had lost the right to recover back his money; *Campbell v. Fleming* (e).

Cur. adv. vult.

WILDE, C. J., now delivered the judgment of the Court.—This was an action of assumpsit for money had and received. The plea was non assumpsit. The action was brought by the plaintiff against the defendant as one of the committee of management of a projected Railway Company, to recover the sum of 82*l.* 10*s.*, paid by the plaintiff as the deposit upon sixty shares which had been allotted to him in that undertaking. The cause was tried before Mr. Justice *Erle*, at Guildhall, after last Trinity Term, when it appeared in evidence that, in the year 1845, a prospectus was issued in the following form:—

"Direct London and Exeter Railway Company, with Extensions to Falmouth and Penzance. Capital, £3,000,000,

(a) 2 M. & G. 475.

(b) 11 M. & W. 401.

(c) 10 M. & W. 147.

(d) 7 M. & G. 590.

(e) 1 Adol. & Ell. 40.

n 120,000 shares of £25 each. Deposit, 1*l.* 7*s.* 6*d.* per share; a further deposit of 1*l.* 5*s.* per share to be paid after the bill has passed the House of Commons, with power to raise £1,000,000 more, if necessary."

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It then proceeds to give the names of the provisional committee and the committee of management, the defendant's name being inserted as one of the latter. The prospectus also states—"that the plans, sections, and books of reference would be ready within the time prescribed by the standing orders of Parliament, and application would be made for a bill to incorporate the Company early in the next session. In case Parliament should not sanction the present undertaking, which every active means will be taken to secure, the money deposited, deducting the necessary expenses attending the projection, will be returned to the shareholders."

"The deposit of 1*l.* 7*s.* 6*d.* per share will be sufficient to comply with the standing orders of the House of Commons, and, after the bill has passed the Commons, a further deposit of 1*l.* 5*s.* will be made, in order to comply with the regulations of the House of Lords. The committee are unwilling to require the whole deposit earlier than is absolutely necessary. Prospectuses and plans of the lines, with forms of application for shares, may be had at the offices of the Company."

It then gives a form of application for shares, addressed to the provisional committee of management in the Direct London and Exeter Railway Company, as follows:—

"Gentlemen,—I request you will allot me — shares of £25 each in the above railway; and I undertake to accept the same, or such less number as you may appropriate to me, subject to the regulations of the Company, and also to pay the necessary deposit of 1*l.* 7*s.* 6*d.* per share, and to sign the Parliamentary contract and subscribers' agreement when required."

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On the 25th of September, 1845, the plaintiff sent in an application for thirty shares in the form prescribed. It appears the defendant afterwards made application to have the number of shares to be allotted to him increased from thirty to sixty. In answer to this application, the plaintiff received the following letter, headed "Not transferable":—

"The Direct London and Exeter Railway Company, with Extensions to Falmouth and Penzance. Provisionally registered. Capital, £3,000,000, in 120,000 shares of £25 each; deposit, 1*l.* 7*s.* 6*d.* per share; number of shares sixty. Sir,—The committee have, at your request, allotted to you sixty shares, of £25 each, in this undertaking, upon condition that the deposit of 1*l.* 7*s.* 6*d.* per share thereon be paid on or before the 28th of October instant, in default of which this allotment will be forfeited, and the shares disposed of to other applicants. The bankers will give a receipt in exchange for this letter, which must be left with them. I beg also to inform you, that the scrip for shares will be delivered to you in exchange for the bankers' receipt, on your executing the Parliamentary contract and subscribers' agreement, of which due notice will be given. Be pleased to observe, the bankers' receipt must be produced when you attend to execute the deed."

This letter was signed by the secretary, and addressed to the plaintiff. In it, as well as in the prospectus, the undertaking is described as one which was to have a capital of £3,000,000 in 120,000 shares. Before the day appointed for the payment of the deposit, an advertisement was published by the managing committee, stating, that the allotment of shares had been completed. It is in the following form, and dated the 17th of October, 1845:—

"The Direct London and Exeter Railway Company,

with Extensions to Falmouth and Penzance. The committee of management hereby give notice, that they have completed the allotment of shares, and that the usual letters are this day issued. In the arduous duty of deciding on claims unprecedented, it is believed, in their number and respectability, the committee have been obliged to give a preference to applicants locally interested, or likely to bring to bear for the Company a large share of legitimate influence. The numerous persons having undoubted claims on the score of wealth and social standing, whose applications have either been passed over or cut down, are requested to accept this reason as the committee's apology. The committee desire to add, that while attestations of public support are daily reaching them from the most influential quarters, the engineering preparations, under Mr. Braithwaite, are so far advanced that the project cannot fail to be placed before Parliament in a manner the most satisfactory to the shareholders."

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Some evidence was given upon the trial, from which it might be inferred that the plaintiff saw this advertisement; and, on the 21st of October, he paid 82*l.* 10*s.*, the deposit on the shares allotted to him. At that time, the committee had, in fact, allotted no more than 58,000 shares, although applications had been made by responsible persons for more than the 120,000. On the 4th of November, the plaintiff executed the subscription contract under seal, which gave power to the committee to pay the expenses which had then or might thereafter be incurred out of the sum thereby subscribed. The plans and sections deposited in the Parliamentary office on the 30th of November were imperfect: the whole of the deposit, except £400, had been expended, and the committee had no funds for making the deposit required by the standing orders of the House of Commons. On the 15th of December a meeting of share-

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holders was called, at which the plaintiff attended: a resolution of confidence in the undertaking and in the committee of management, and that a further allotment of shares should be made to raise the sum required for the deposit, was proposed. To this resolution the plaintiff moved an amendment, "That, as 58,000 shares only had been allotted, the deposits already received should be returned to the parties who had paid them." The chairman did not put the amendment, but the original resolution, which was carried by a large majority. A few days afterwards the committee found it was impossible to proceed with the undertaking, and on the 6th of January, 1846, this action was commenced.

On this state of facts, it was contended on the part of the plaintiff, that the advertisement stating the allotment of shares to have been completed was false to the knowledge of the defendant, and was a fraudulent misrepresentation; and that the plaintiff having been thereby induced to pay his money was entitled to recover it in this action; and that the deed was executed by the plaintiff under the influence of the same misrepresentation, and therefore did not affect his right. For the defendant, it was contended, that the written application for shares and the letter of allotment constituted a valid contract, by which the plaintiff was bound to pay the deposit on or before the 28th of October; consequently he could not be permitted to ascribe to the advertisement the payment he had made; and further, that, whatever might have been the result had the case rested on the prospectus and letter only, the deed contained an express authority for the application of the deposits to the payment of the preliminary Parliamentary expenses. The learned Judge who tried the cause, without declaring his opinion whether the letters of application and allotment constituted a binding contract or not, left it to the jury to say whether the plaintiff had made a fraudulent misrepresenta-

tion, which was a material inducement to the plaintiff to pay his money; whether the consideration had failed, the company being at an end; and whether the deed executed by the plaintiff was so executed under the same belief which operated on his mind when he paid his money. The jury answered these questions in the affirmative, and the learned Judge said this finding would entitle the plaintiff to a verdict for the amount claimed, 82*l.* 10*s.* In Michaelmas Term last, a rule nisi was obtained for entering a nonsuit or a verdict for the defendant, or for a new trial, on the ground of misdirection. The case was recently argued before us, and it was then contended, as at the trial, on behalf of the defendant, that the letters constituted a binding contract; and that the payment by the plaintiff must be ascribed to his legal liability, and not to the advertisement. That the advertisement contained no misrepresentation, because it did not import that the whole number of shares had been allotted, or if it did, that the representation was manifestly addressed to disappointed applicants, and not to allottees, and therefore had no reference to the plaintiff. That, if the money was not obtained by fraud, the deed which the plaintiff had executed expressly authorised the application of it to the payment of the expenses; but it was admitted, that, if the payment was originally obtained from the plaintiff by fraud, the deed would be no answer to the action. It was further contended, that the plaintiff, by attending the meeting on the 15th of December, and acting as a shareholder after he knew that no greater number than 58,000 shares had been allotted, had thereby precluded himself from claiming the return of his deposit. On this point, the case of *Campbell v. Fleming* was cited as an authority.

Upon the first of these points we are of opinion, that there was no contract binding on the plaintiff to part with his money at the time when he paid the deposit: he had

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applied for sixty shares in an undertaking which was to have a capital of £3,000,000 in 120,000 shares of £25 each. The committee allotted to him a very different thing, but professed to allot him that which he had asked for, and the letter of allotment, as well as the prospectus, described the capital as £3,000,000; the number of shares 120,000. Now, it might be reasonable to expect that such an undertaking would succeed with a capital of £3,000,000, but absurd to suppose it could be accomplished for less than half that sum. The plaintiff having asked for shares in a practicable undertaking, received shares in one that was impracticable, and which was rendered so by the act of the committee in refusing to allot more than 58,000, although more than the whole 120,000 had been applied for by responsible persons. That which was allotted to him not being in truth what the plaintiff asked for, he was not bound to take it. Again, the allotment was not absolute, but conditional only, and on that ground also we think the application for shares and letter of allotment do not constitute a valid contract, the letter of allotment not being a simple acceptance of the plaintiff's proposal.

Such being our opinion as to the alleged contract, we must inquire whether there was any evidence that the plaintiff was induced to pay his money on a fraudulent misrepresentation: if there was not, the plaintiff ought to have been nonsuited, or a verdict found for the defendant; but we think there was ample evidence of such misrepresentation and inducement. We think the advertisement means that all the shares had been allotted, and as it was a public advertisement, at least it must be taken to have been addressed to all those who were interested in the subject-matter, of whom the plaintiff undoubtedly was one. To him it represents that he had got what he asked for, that is, sixty of the 120,000 shares in the proposed undertaking. The jury were therefore well warranted

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in finding the representation so made was a material inducement to the plaintiff to pay his money. If the meaning of the prospectus was for the jury, they appear to have construed it as we do ; either way there was ample evidence to be left to the jury on this point ; and there is no ground, therefore, either for a nonsuit or a verdict for the defendant. The next point was, that the plaintiff, by attending and acting as a shareholder at the meeting of the 15th December, when he knew that 58,000 shares only had been allotted, had thereby precluded himself from making any claim to the deposit on that ground. But the evidence disposes of that point ; for the only act done by the plaintiff at that meeting was to propose that, in consequence of the allotment of only 58,000 shares, all the deposits should be returned ; and the argument comes to this, that having tried to induce others to join him in claiming the deposit, and, failing in that attempt, he shall not be permitted to do so alone. No such doctrine as that is to be found in *Campbell v. Fleming*, or in any other decided case of which we are aware. The plaintiff did no act at the meeting, or afterwards, shewing his assent to be treated as a holder of sixty shares ; and we think, that, notwithstanding his attending at the meeting, he is in a condition to maintain the present action : the motion, therefore, for a nonsuit, or to enter the verdict for the defendant, fails.

But it was further contended by Mr. *Fitzherbert*, that the defendant was entitled to a new trial because the learned Judge did not tell the jury whether the letter of application and allotment did or did not constitute a binding contract. It is impossible to make that a ground for a new trial. Whether they constituted a contract or not is a question of law for the Court, not of fact for the jury ; and if a new trial were granted, the same questions that the learned Judge submitted to the jury must be again submitted

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to them. However, it appears that, after taking their *Opinion* upon the question of fraudulent misrepresentation, *the* judge said the plaintiff was entitled to a verdict, which must be taken as a direction to the jury to find such a verdict. If, in order to give that direction, it was necessary to decide the letters did not constitute a contract, the learned Judge, in giving that direction, must be taken to have so decided; and if we had considered these letters did constitute a contract, we must have considered the direction incorrect, and made the rule absolute for a new trial, inasmuch as we think the direction right, the rule obtained for the defendant fails as to this as well as to the other points, and must therefore be discharged. My Brother Williams, when at the bar, having been consulted in this case, has taken no part in the consideration of the question.

Rule discharged.

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The LONDON AND NORTH WESTERN RAILWAY COMPANY. 7th, 12th, &
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a motion to dissolve an injunction granted the plaintiff, to restrain the defendants, their from lowering or excavating the carriage road, interfere with or affect the plaintiff's land in any inconsistent with the provisions of the Trent Valley Act, (8 & 9 Vict. c. cxii. (a),) or the plans and

Plaintiff,
owner of a
piece of land
through which
a railway com-
pany by their
plans and sec-
tions repre-
sented they
intended to
pass on an

as to cross a public road on the level, filed a bill and obtained an ex parte injunction to restrain the Company from lowering or excavating the road or affecting the any manner inconsistent with the provisions of their act or the deposited plans agreement entered into by the plaintiff with the Company.

uses Consolidation Act having been incorporated with the special act and the according to the latter act :—*Held*, that the Company were entitled to exercise all the the General and Special Act, although the plaintiff's bill and affidavits stated it was entered into on the understanding that the line would be made according sections.

where a company are directed by their act to do a certain thing for the benefit doing which they would be liable to pay compensation for injury to an individual cannot bind themselves by any contract in respect of such individual right, so that the intention of the Legislature.

ed an ex parte injunction, and, at the same time, gave notice of motion to ex- on; but the motion was not heard. Defendants afterwards gave notice of re. Both parties claimed precedence :—*Held*, that the defendants, although e entitled, from the nature of the motion, to be first heard.

aterial sections of
the following :—

hereby it was en-
several acts of Par-
liament, viz. The Com-
Consolidation Act,
uses Consolidation
Railway Clauses
Act should be in-
and form part of

and whereas plans
the railway, shew-
level thereof, and

also books of reference containing
the names of owners, or reputed
owners, lessees, or reputed lessees
and occupiers of the lands through
which the same is intended to
pass, have been deposited with the
clerks of the peace of the counties
of Stafford and Warwick, and
with the clerk of the peace for the
county and the city of Lichfield,
be it enacted, that, subject to the
provisions in this and the said re-
cited acts contained, it shall be
lawful for the said Company, and

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sections therein referred to, or the agreement of the 26th of July, 1846, in the plaintiff's bill mentioned.

The facts were as follow:—

The plaintiff was seised of a small piece of land, containing about three acres, in the county of Stafford, which piece of land was comprised and described in the deposited plans and sections as part of the land which the Trent Valley Railway Company were authorised to take for the purposes of their railway. In the year 1846, under powers contained in the Trent Valley Railway Act, the London and Birmingham, then and now called the London and North Western Railway Company, became the purchasers of the Trent Valley Railway, subject to the obligations attaching to that Company. By the plans and sections it appeared that about 1 rood 38 perches of the plaintiff's land would be required to be taken by the Company, adjoining which was a public road, (in the bill described as an old public turnpike-road, but which in fact had ceased to be a turnpike road since 1827). It also appeared that the railway would pass over the plaintiff's lands upon an embankment, about 11 yards wide at the base, and about 10 feet above the level of the land and the public road, which was on a level with the plaintiff's land. It also appeared by the plans and sections that it was the intention of the Railway Company to raise the road, so that the railway should cross it on a level.

The Railway Company entered into an agreement with the owner of the adjoining lands, whereby they contracted

they are hereby expressly required to make and maintain the said railway and works in the line, and upon the lands delineated in the said plans and described in the said books of reference, and to enter upon, take, and use such of the said lands as shall be necessary for such purpose."

Sect. 33, "That it shall be law-

ful for the Company to construct the said railway across and on the level of the following turnpike and public carriage roads. [Then follows a list of such roads, and amongst them]

"In the parish of Armitage and Hansacre, the road numbered 32 ——" [being the road mentioned in the pleadings.]

to pay £70 for so much land as they should require if the road were carried under the railway, but £100 more if the railway were carried over it on the level. They also entered into an agreement with the plaintiff, dated the 26th of July, 1846, whereby, after reciting, that, by the Lands Clauses Consolidation Act, provision had been made for settlement by arbitration of all matters connected with the sale of lands for public purposes; and that "the Company are desirous of purchasing certain lands from the said vendor, in the parish of Armitage, for the purpose of constructing a railway from Stafford to Rugby, according to a certain plan and section thereof deposited with the parish clerk of the said parish, which said lands have been staked out by the agents of the said Company, and contain by admeasurement 1 rood 38 perches: It is witnessed, that, under and by virtue of the said act, and subject to the provisions thereof, unless otherwise therein expressed, the said plaintiff had agreed to sell, and the said H. W. (the agent of the Company) had agreed to purchase, the said lands, and that the price to be paid for the same, and also the compensation for severance, and other damage or loss which the said vendor had suffered, or might thereafter suffer, by reason of the construction of the railway, should be referred to arbitration." And it was further agreed, that it should be lawful for the Company to take possession of the lands on paying to the plaintiff the value of the plant for brick-making on the premises, and making compensation to the tenants of the lands, and depositing 375*l.* 4*s.* 9*d.*, but without prejudice to any larger sum which might be awarded, and at the risk of the Company to abide the award. And the Company agreed to pay interest, at 4*l.* per cent. on such sum as the arbitrator might award from the time possession was given or taken until payment of the sum awarded. Provision also was made for fencing in the land before commencing the works, and liberty was given to the plaintiff to produce evidence before the arbitrator of the value of the

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sections therein referred to, or the agreement of the 26th of July, 1846, in the plaintiff's bill mentioned.

The facts were as follow :—

The plaintiff was seised of a small piece of land, containing about three acres, in the county of Stafford, which piece of land was comprised and described in the deposited plans and sections as part of the land which the Trent Valley Railway Company were authorised to take for the purposes of their railway. In the year 1846, under powers contained in the Trent Valley Railway Act, the London and Birmingham, then and now called the London and North Western Railway Company, became the purchasers of the Trent Valley Railway, subject to the obligations attaching to that Company. By the plans and sections it appeared that about 1 rood 38 perches of the plaintiff's land would be required to be taken by the Company, adjoining which was a public road, (in the bill described as an old public turnpike-road, but which in fact had ceased to be a turnpike road since 1827). It also appeared that the railway would pass over the plaintiff's lands upon an embankment, about 11 yards wide at the base, and about 10 feet above the level of the land and the public road, which was on a level with the plaintiff's land. It also appeared by the plans and sections that it was the intention of the Railway Company to raise the road, so that the railway should cross it on a level.

The Railway Company entered into an agreement with the owner of the adjoining lands, whereby they contracted

they are hereby expressly required to make and maintain the said railway and works in the line, and upon the lands delineated in the said plans and described in the said books of reference, and to enter upon, take, and use such of the said lands as shall be necessary for such purpose."

Sect. 33, "That it shall be law-

ful for the Company to construct the said railway across and on the level of the following turnpike and public carriage roads. [Then follows a list of such roads, and amongst them]

"In the parish of Armitage and Hansacre, the road numbered 32 ——" [being the road mentioned in the pleadings.]

to pay £70 for so much land as they should require if the road were carried under the railway, but £100 more if the railway were carried over it on the level. They also entered into an agreement with the plaintiff, dated the 26th of July, 1846, whereby, after reciting, that, by the Lands Clauses Consolidation Act, provision had been made for settlement by arbitration of all matters connected with the sale of lands for public purposes; and that “the Company are desirous of purchasing certain lands from the said vendor, in the parish of Armitage, for the purpose of constructing a railway from Stafford to Rugby, according to a certain plan and section thereof deposited with the parish clerk of the said parish, which said lands have been staked out by the agents of the said Company, and contain by admeasurement 1 rood 38 perches: It is witnessed, that, under and by virtue of the said act, and subject to the provisions thereof, unless otherwise therein expressed, the said plaintiff had agreed to sell, and the said H. W. (the agent of the Company) had agreed to purchase, the said lands, and that the price to be paid for the same, and also the compensation for severance, and other damage or loss which the said vendor had suffered, or might thereafter suffer, by reason of the construction of the railway, should be referred to arbitration.” And it was further agreed, that it should be lawful for the Company to take possession of the lands on paying to the plaintiff the value of the plant for brick-making on the premises, and making compensation to the tenants of the lands, and depositing 375*l.* 4*s.* 9*d.*, but without prejudice to any larger sum which might be awarded, and at the risk of the Company to abide the award. And the Company agreed to pay interest, at 4*l.* per cent. on such sum as the arbitrator might award from the time possession was given or taken until payment of the sum awarded. Provision also was made for fencing in the land before commencing the works, and liberty was given to the plaintiff to produce evidence before the arbitrator of the value of the

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sections therein referred to, or the agreement of the July, 1846, in the plaintiff's bill mentioned.

The facts were as follow :—

The plaintiff was seised of a small piece of land, containing about three acres, in the county of Stafford. A piece of land was comprised and described in the plans and sections as part of the land which the Trent Valley Railway Company were authorised to take for the purposes of their railway. In the year 1846, under an Act contained in the Trent Valley Railway Act, the London and Birmingham, then and now called the London and North Western Railway Company, became the purchaser of the Trent Valley Railway, subject to the obligations attaching to that Company. By the plans and sections it appeared that about 1 rood 38 perches of the plaintiff's land were to be required to be taken by the Company, adjoining a public road, (in the bill described as an old turnpike-road, but which in fact had ceased to be a turnpike road since 1827). It also appeared that the railway would pass over the plaintiff's lands upon an embankment about 11 yards wide at the base, and about 10 feet above the level of the land and the public road, which was on a level with the plaintiff's land. It also appeared by the plans and sections that it was the intention of the Railway Company to raise the road, so that the railway should cross it on a level.

The Railway Company entered into an agreement with the owner of the adjoining lands, whereby they covenanted

that they are hereby expressly required to make and maintain the said railway and works in the line, and upon the lands delineated in the said plans and described in the said books of reference, and to enter upon, take, and use such of the said lands as shall be necessary for such purpose."

Sect. 33, "That it shall be law-

ful for the Company to lay out the said railway across a level of the following lands, and public carriage roads, and follows a list of such roads amongst them]

"In the parish of St. Martin and Hansacre, the road is 32 ——" [being the road mentioned in the pleadings.]

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The facts were as follow :—

The plaintiff was seised of a small piece of land, ing about three acres, in the county of Stafford piece of land was comprised and described in the d plans and sections as part of the land which the Tr ley Railway Company were authorised to take for poses of their railway. In the year 1846, under contained in the Trent Valley Railway Act, the and Birmingham, then and now called the Lon North Western Railway Company, became the purc the Trent Valley Railway, subject to the obligations ing to that Company. By the plans and sections it : that about 1 rood 38 perches of the plaintiff's lan be required to be taken by the Company, adjoining was a public road, (in the bill described as an ol turnpike-road, but which in fact had ceased to b pike road since 1827). It also appeared that the would pass over the plaintiff's lands upon an emba about 11 yards wide at the base, and about 10 feet a level of the land and the public road, which was o with the plaintiff's land. It also appeared by the p sections that it was the intention of the Railway C to raise the road, so that the railway should cro a level.

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scribed in the said books of refer- amongst them]

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to pay £70 for so much land as they should require if the road were carried under the railway, but £100 more if the railway were carried over it on the level. They also entered into an agreement with the plaintiff, dated the 26th of July, 1846, whereby, after reciting, that, by the Lands Clauses Consolidation Act, provision had been made for settlement by arbitration of all matters connected with the sale of lands for public purposes; and that “the Company are desirous of purchasing certain lands from the said vendor, in the parish of Armitage, for the purpose of constructing a railway from Stafford to Rugby, according to a certain plan and section thereof deposited with the parish clerk of the said parish, which said lands have been staked out by the agents of the said Company, and contain by admeasurement 1 rood 38 perches: It is witnessed, that, under and by virtue of the said act, and subject to the provisions thereof, unless otherwise therein expressed, the said plaintiff had agreed to sell, and the said H. W. (the agent of the Company) had agreed to purchase, the said lands, and that the price to be paid for the same, and also the compensation for severance, and other damage or loss which the said vendor had suffered, or might thereafter suffer, by reason of the construction of the railway, should be referred to arbitration.” And it was further agreed, that it should be lawful for the Company to take possession of the lands on paying to the plaintiff the value of the plant for brick-making on the premises, and making compensation to the tenants of the lands, and depositing 375*l.* 4*s.* 9*d.*, but without prejudice to any larger sum which might be awarded, and at the risk of the Company to abide the award. And the Company agreed to pay interest, at 4*l.* per cent. on such sum as the arbitrator might award from the time possession was given or taken until payment of the sum awarded. Provision also was made for fencing in the land before commencing the works, and liberty was given to the plaintiff to produce evidence before the arbitrator of the value of the

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The facts were as follow :—

The plaintiff was seised of a small piece of land, containing about three acres, in the county of Stafford, which piece of land was comprised and described in the deposit plans and sections as part of the land which the Trent Valley Railway Company were authorised to take for the purposes of their railway. In the year 1846, under powers contained in the Trent Valley Railway Act, the London and Birmingham, then and now called the London North Western Railway Company, became the purchaser of the Trent Valley Railway, subject to the obligations attaching to that Company. By the plans and sections it appeared that about 1 rood 38 perches of the plaintiff's land would be required to be taken by the Company, adjoining which was a public road, (in the bill described as an old private turnpike-road, but which in fact had ceased to be a turnpike road since 1827). It also appeared that the railway would pass over the plaintiff's lands upon an embankment about 11 yards wide at the base, and about 10 feet above the level of the land and the public road, which was on a level with the plaintiff's land. It also appeared by the plans and sections that it was the intention of the Railway Company to raise the road, so that the railway should cross it on a level.

The Railway Company entered into an agreement with the owner of the adjoining lands, whereby they contracted

that they are hereby expressly required to make and maintain the said railway and works in the line, and upon the lands delineated in the said plans and described in the said books of reference, and to enter upon, take, and use such of the said lands as shall be necessary for such purpose."

Sect. 33, "That it shall be law-

ful for the Company to construct the said railway across and on the level of the following turnpike and public carriage roads. [It follows a list of such roads, amongst them]

"In the parish of Arminster and Hansacre, the road numbered 32 ——" [being the road mentioned in the pleadings.]

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lands, and of any damages or loss he might have sustained, or might be subject to, by reason of the construction of the railway.

The bill, after stating these facts, further stated, that the said agreement had not at the filing of the bill been executed, but the sum agreed had been deposited by the Company.

That the plaintiff would not have entered into the agreement, or allowed the railway to be constructed on his land, save in the full confidence which he entertained that the plans and sections would be adhered to in the formation of the railway.

That the Railway Company had, by their agents and workmen, entered upon the plaintiff's land and made an embankment according to the plans and sections, but instead of raising the turnpike-road, so as to make it level with the railway at the point where it crossed the road, they were then in the course of lowering the road, so as to carry the same under the railway, at a depth of eighteen feet below the railway, and seven feet below the lowest part of the surface of plaintiff's land.

That such works were a deviation from, and inconsistent with, and in direct violation of the Trent Valley Railway Act, and the plans and sections in that behalf, and the agreement of the 26th of July; and that such works were prejudicial to the plaintiff in his enjoyment and exercise of the rights of ownership in, on, and over such portion of his land as had been taken and purchased, as well as to plaintiff's rights of ownership and rights of way to, and over, and connected with the same turnpike-road and railway, and the free use thereof; and such proceedings of the defendants were especially injurious and prejudicial to plaintiff's right of building up to the boundary of such part of his land as was not taken by the Company, and such part as adjoined the turnpike-road.

The bill, after praying an injunction in the form granted, also prayed that the Railway Company might be decreed to

restore the level of the road, where the same had been altered and covered, to its former level, and then to raise it up to such a level and in such a manner as that the same should be on a level with the said railway where the same was intersected by the road; and in all other respects to complete the railway works where the same adjoined or passed over or along the plaintiff's land according to the plans and sections, and also to make compensation to the plaintiff in respect of the injury which he had sustained by the improper deviation from such plans and sections by the Railway Company.

Affidavits filed by the plaintiff went to shew, that the alteration of the road, by lowering it instead of carrying it up to the level of the railway, was very prejudicial to his interests and detrimental to his property, and in direct opposition to the plans and sections deposited by the Company.

The affidavits filed on the part of the Company shewed, that the Company had deviated from their original plans in consequence of a memorial signed by the inhabitants of the adjoining parish, requesting them, for the convenience of the public, not to cross the road on a level.

At the commencement of the proceedings a question arose, whether the plaintiff, who had amended his bill on the 5th of November, and at the same time had given notice of motion to extend the injunction, but had not been able to bring it on, was entitled to open the case, or whether the defendants, who did not move to dissolve until the 21st November, were to be first heard.

The MASTER OF THE ROLLS.—The motion to extend is founded on the stability of the order to grant the injunction. If the order to grant is removed, there can be no ground for moving to extend the injunction. I think the regular course is for the defendants to try if they can remove the order on which the plaintiff relies.

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The motion to dissolve was then proceeded with.

Mr. *Turner*, Mr. *Bazalgette*, and Mr. *Follett*, in support of the motion.—By the 46th section of the Railway Clauses Consolidation Act, the Company have a good legal right to make the road under the railway. The Legislature considered it of great importance to prevent railways from crossing roads on a level, and it provided that in no case should they be allowed to do so unless specially authorised by their act. There is a great difference between a power and an obligation; in this case there is a power limiting the words of the general act.

The clauses of the general act were framed with a view to the convenience of the public, as well as to prevent injury being inflicted on individuals.

The Legislature considers it of greater consequence to secure an advantage to the public, by giving the Railway Company the power of diverting public roads, than to protect the interests of individuals by withholding that power. And it acts on this principle, because, in every case where an injury is done to an individual, there is a remedy by compensation.

There is not anything in the terms of the agreement to limit the effect of the general act, or to deprive the Company of the powers conferred by it to make the road in the manner most convenient to the public. The plaintiff has left all question of damages to arbitration, and he cannot refer it to another tribunal.

Mr. *Cooper* and Mr. *Cooke*, *contrà*.—The language of the 31st clause of the Railway Clauses Consolidation Act not only says that it shall be lawful, but “that the Company are expressly required to make and maintain the said railway and works in the line and upon the lands,” &c.; the plans and sections are referred to, and the works must be carried on in conformity with those plans and sections.

The only power of deviating is given by the 66th section of the general act, by proceeding in a certain mode, viz. by applying to the Board of Trade. The Company, before they begin to make their railway, are under a parliamentary obligation to deposit certain plans and sections with the clerk of the peace. Those plans &c., according to the words of Lord *Eldon*, in *Blakemore v. The Glamorganshire Canal Company* (a), form the contract with the Legislature upon which the powers are conferred. The agreement does not provide for a case of damage generally, but merely for damages and compensation caused by the proceedings of the Company when in conformity with the plans and sections, and the line which the plaintiff understood, at the time of the agreement, the Company intended to abide by. The Company, by their deviation, will interfere with the legal rights of the plaintiff, by preventing him from using the powers conferred by the 76th section of the general act; but, independently of legal rights, the plaintiff has a clear equitable right under his agreement to restrain the Company by injunction from deviating from their original line, when it was one of the terms of that agreement, or at all events it was clearly understood by the plaintiff, that the works of the Company should proceed in a certain defined manner; and on this footing alone was the agreement executed. The Court will always interfere by injunction in cases where the Company have obtained possession under an agreement, and afterwards refuse to carry out the terms on which alone they were permitted to enter.

If there is a reasonable doubt as to the powers conferred by an act of Parliament, the Court will rather favour private interests than enable companies to extend powers already too large: *Webb v. Manchester and Leeds Railway Company* (b).

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(a) 1 My. & K. 154.

(b) Ante, Vol. 1, p. 576.

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The motion to dissolve was then proceeded with.

Mr. *Turner*, Mr. *Bazalgette*, and Mr. *Follett*, in support of the motion.—By the 46th section of the Railway Clauses Consolidation Act, the Company have a good legal right to make the road under the railway. The Legislature considered it of great importance to prevent railways from crossing roads on a level, and it provided that in no case should they be allowed to do so unless specially authorised by their act. There is a great difference between a power and an obligation; in this case there is a power limiting the words of the general act.

The clauses of the general act were framed with a view to the convenience of the public, as well as to prevent injury being inflicted on individuals.

The Legislature considers it of greater consequence to secure an advantage to the public, by giving the Railway Company the power of diverting public roads, than to protect the interests of individuals by withholding that power. And it acts on this principle, because, in every case where an injury is done to an individual, there is a remedy by compensation.

There is not anything in the terms of the agreement to limit the effect of the general act, or to deprive the Company of the powers conferred by it to make the road in the manner most convenient to the public. The plaintiff has left all question of damages to arbitration, and he cannot refer it to another tribunal.

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Mr. *Turner* replied.

The MASTER OF THE ROLLS.—In this case two questions, certainly very distinct from each other; in several respects, arise. The power which the acts of Parliament give the Company is the subject of one of the questions; the obligations which the Company may have entered into with the plaintiff is the subject of the other. In all these cases it is the duty of the Court which has to adjudicate on such matters, on the one hand, to take care that the Company does not exercise greater powers over the private property of individuals than is conferred on them by the Legislature; on the other, to see that they shall not be impeded in the exercise of those powers which the Legislature clearly intended to confer upon them. On many occasions there are considerable difficulties. On some occasions a feeling is excited, which I cannot deny to have existed in my own mind very frequently, that the Court must be more than ordinarily vigilant to prevent encroachments in the least degree on the private property of individuals without authority.

When this injunction was first applied for, I was very much struck with the peculiar application. It was the first time that it had occurred to me certainly to have any individual complaining that a Railway Company, having power to make the roads of the country cross at a level, did not wish to exercise that power, but rather to exercise the power which they had of making those roads pass under or over the railway, (as it might be), in this case under the railway. No one can have attended to this subject for one moment without knowing that the public, at least, have a very great interest to prevent the common roads crossing the railway on a level. Everybody must have heard of accidents which are too likely to recur when such is the case; but it was urged on me then, as it has been on the discussion of this motion, that the plaintiff does not come

here for the public good, but to protect his individual right, which ought not to be in any way invaded on the pretence that the public may have an interest in so doing; and certainly it is not to be invaded in any way because it may be imagined that the public interest would be injured, unless such invasion is authorised by the act of Parliament.

In the month of May, 1845, the General Railway Clauses Consolidation Act passed, undoubtedly for most important purposes, and for the purpose of giving to Railway Companies the power, in some respects, of carrying out the real intention of the act, without the expense of applying again to Parliament for that purpose; and Companies were empowered to do many things which had been usually inserted in particular acts, and also some things which may or may not have been inserted in particular acts. As to those powers which were in the particular acts, two were very obviously to be noticed: one the power of making lateral deviations, the other the power of making vertical deviations. Those powers need not now be, and are not, I believe, inserted in particular acts, because they are expressly provided for by the act to which I am now referring. There are also powers given of making works of a particular kind, and especially those works which are referred to in the 16th clause, by which, subject to the provisions contained in this the general act, and subject also to the provisions which may be contained in the special act, power is given to do a great variety of things, which I need not notice further than this, that there seems to me to be a distinct power given to carry a road underneath the railway. Is there anything in this general act to the contrary of that? I am of opinion there is not. Is there anything in the provisions of the special act which is contrary to that? It is said that the 31st clause is so. Now, on looking to the 31st clause, I am of opinion the enacting part does not abridge that power. It does provide that the line shall be observed. There is no proposi-

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tion made in this case to alter the line of the railway in any respect whatever, either to make vertical or lateral deviations. Then, what is there which constitutes a legislative provision that this power conferred by the general act is not to have its operation? Why, in the plan which was deposited in the usual manner, the road in the particular place now in question was designated as a road which was to pass at a level, and by a clause in the act permission was given for that purpose; but it was not conceived by the Legislature itself that that clause restricted in any way the powers given by the preceding act. I am therefore of opinion that there is nothing in the general or in the special act which restricts the Company from doing that which everybody knows is, in this case, greatly for the benefit of the public; and whether it be or not a power, like many others, which greatly, and sometimes very unhappily, interferes with the private property of individuals, it is, nevertheless, a power which the Legislature intended to confer, and which I am of opinion the Company possessed, if they were not deprived of it by the agreement.

Now, when we come to the agreement, it is one which I think the parties very properly entered into to prevent expense and delay; it is, in fact, an agreement to refer the question of value and the amount of loss and damage to arbitration. It refers in the recital to the special act, and by so doing must include every portion of it, consequently those portions which are expressly incorporated with the general act. If the law did not of itself impute to every man a knowledge of the acts of Parliament relating to these matters, (I am very certain a knowledge which cannot in many cases practically exist), yet in this particular case the attention of the plaintiff must have been necessarily drawn to it; and if he thought fit to neglect the opportunity he had of reading it, I am afraid he must suffer the loss. I think it is stated in this agreement, that he thought fit to draw it without an attorney, but he is himself a person

learned in the law, or a student of the law, and might have known that if he referred to an act of Parliament he was bound to know the contents, or what was the effect of it on the particular subject of his consideration. Looking at that agreement, I am of opinion there is nothing in it which can in any way even tend to diminish the power which the Company derived under the acts of Parliament.

I must say, though it has not been argued, I do not think it perfectly clear that a Company, having a power given to it mainly for the public good, but which may effect an injury on an individual in respect of which compensation can be given, (which case I desire always to distinguish from injury done for which there can be no compensation), has a right to contract itself out of those powers. These matters ought certainly to be most carefully considered. I certainly have never felt the least disposition to extend the powers of railway companies, and I believe it would be greatly for their and for the public advantage if those powers were less than they seem to be; but if they have those powers given them for the public benefit, such, for instance, as to make a road under instead of across a railway, I do not think they have the right or the power to contract themselves out of it with any individual whatever. But I am of opinion, that, in the construction of this agreement, they have not done that.

There is another point which has been referred to, but it is one which, if it stood alone, I do not think would induce me to dissolve this injunction. I do not think it was perfectly candid in the plaintiff not to state all that he knew. He had had conversations; but, if I correctly understand them, they led to nothing like a mutual understanding or mutual agreement about the matter. It is not unlikely that the plaintiff, foreseeing some advantages at that time from carrying the road under the railway, was desirous to have it done, and that he expressed that desire as it is stated; but there was no mutual understanding or

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mutual agreement arising out of them, unless we may judge that he had agreed because he had proposed, and that the Company had agreed to it, because they went and entered into a contract with another person on the foundation of it. It seems to me to be too difficult to come to a conclusion upon it, and therefore, if it stood alone, I do not think I should come to the conclusion, to which, on the part of the defendant it has been argued I ought to have come. If, on the other hand, the plaintiff, having altered his first view of it, conceived that by means of the embankments to be made for the road to pass over the level of the railway he might derive some peculiar advantage to himself, or that he might compel the Company to buy land which they did not otherwise want, it requires no observation from me to shew that that was not a proper object, unless he communicated it at that time to the Company. These are things in which there ought to be something like openness and fairness. I do not think he is shown to have had anything of the kind.

If that had been the ground on which alone I was asked to dissolve the injunction, I confess my impression is, I should not have done it on these affidavits. But on the other ground, that the law without agreement entitles the Company to do that which they were proposing to do, and that the agreement, on the construction of it, if they had a right to enter into it, does not debar them from the exercise of the power which the act of Parliament gave them, I think it right to dissolve the injunction.

From this judgment the plaintiff appealed.

The motion was argued by the same counsel as in the Court below.

Dec. 19.

The LORD CHANCELLOR [without hearing the respondents].—This appears to me to be a very plain case. The

whole question is, whether the powers conferred on the Company by the Legislature have been in any manner restricted by the terms of the agreement. Under the powers of their own act the Company have a specific power to pass the road on a level, and by the general act they have, according to the decision of *Tod v. The North British Railway* (a), a right to pass under the road, and there is no question as to their general power. The whole question, therefore, simply turns on the terms of the agreement. The reference to the plans on the agreement has merely reference to the plaintiff's land to be purchased. There appears to be nothing in the agreement to limit the powers given to the Company by the general act, and I must dismiss this appeal with costs.

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(a) Ante, p. 449.

BEFORE THE VICE-CHANCELLOR OF ENGLAND.

LONDON AND NORTH WESTERN RAILWAY COMPANY v.
SWAINSON.

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Feb. 10th.

THIS was a motion to discharge an order of the Master, allowing the defendant six weeks further time for putting in his answer.

The bill was filed by the Railway Company on the 22nd of December, 1846, against the defendant for the specific

considered before the answer could be put in, is not sufficient excuse for delay in putting in such answer, and an order of the Master allowing six weeks further time discharged on application to the Court.

The fact of a defence to a bill being founded on a great many acts of Parliament, which it was stated by affidavit must be perused and

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performance of a contract alleged to have been entered into by him for the sale of land to the plaintiffs.

Mr. *Bethell* and Mr. *Follett*, in support of the motion.

Mr. *Walker* and Mr. *Wright*, contra, produced an affidavit of the defendant's solicitor, stating, that, on the 1st of January, he received a copy of the bill; that on the 7th he took instructions for the answer, and on the 14th laid the instructions before counsel; that on the 27th he received the opinion of counsel, which stated that it would be necessary for the defendant to peruse the various acts of Parliament of the Railway Company (thirty-four in number); and that thereupon an application for further time was made to the Master, who, by order, allowed six weeks further time to answer. And they contended, that the usual time was insufficient to answer a bill of 198 folios, involving many questions as to the powers conferred on the Company by their acts, which were so numerous that it would be impossible to do justice to the defendant's case if such further time were not allowed. That the defendant's answer required great care and attention, as he was involved in a question between two Railway Companies, both of whom claimed the land in question; and that the time granted was only a reasonable time under such circumstances.

The VICE-CHANCELLOR.—It appears to me that the Master's order is altogether wrong, and that the counsel have been in error in applying for time in order to peruse acts of Parliament. The Court presumes that counsel know acts of Parliament; indeed, every one is presumed to know the law; at all events, the solicitors on the line of the railway must be well aware of the powers of the Company under their several acts, and nothing is easier than access to acts of Parliament. With reference, therefore, to what I

must consider to be the facts of this case, and also to the theoretical view I take of it, it appears to me that there is no ground whatever for supporting the Master's order.

His Honor afterwards recommended that the defendant should be allowed ten days for answering, which the plaintiffs accordingly granted.

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Re The WILTS, SOMERSET, and WEYMOUTH RAILWAY COMPANY, Ex parte The MARQUIS OF BATH, (an Infant). *March 26th.*

THE petition in this case prayed the investment of a sum of money which had been paid into Court by a railway company for the purchase of certain portions of the petitioner's lands, and also prayed the costs, charges, and expenses of the application, and of the investment; and also of preparing the abstract of title to, and of making the conveyance of the land, &c.

The Court has no power, under the Lands Clauses Consolidation Act, to order payment of the costs of deducing the title, and of the conveyance of lands to a railway company.

Mr. *J. H. Farrer*, (the counsel for the petitioners), submitted to the Court, whether it had the power to make an order for the payment of the costs of preparing the abstract and of the conveyance.

The VICE-CHANCELLOR (after perusing the act), was of opinion, that he had no power under it to order payment of the costs of the abstract and conveyance, but he made the best of the order according to the prayer.

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BEFORE VICE-CHANCELLOR KNIGHT BRUCE AND THE
LORD CHANCELLOR.Nov. 17th &
28th.

1847.

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A bill was filed by five shareholders in a provisionally registered Company on behalf of themselves, and all other shareholders except the defendants, against the provisional committee, praying that it might be declared that the objects of the Company had failed through the neglect and misconduct of the defendants, and that various accounts might be taken, and the funds in Court applied in discharge of the joint liabilities of the partnership, and also that the residue of the deposits might be paid to the plaintiffs and other shareholders.

THE bill was filed 25th July, 1846, by five persons, on behalf of themselves and all other persons being shareholders in the Midland and Eastern Counties Railway Company, except the defendants, who formed the committee of management of that Company; and it stated, that, in July, 1845, a Company was formed and provisionally registered for carrying into effect a project for making the proposed railway, the capital to be £1,500,000, to be divided into 60,000 shares of £25 each, upon which a deposit of 2*l.* 12*s.* 6*d.* was to be paid, and a prospectus was issued by the promoters to this effect.

That, shortly after the publication of the prospectus, the managing committee opened subscription lists, and received applications for shares in the Company from persons who were solvent and respectable and in all respects eligible as shareholders, to an amount exceeding the number of shares to be subscribed for in order to raise the whole capital, and the committee were enabled, if they had thought fit, to have allotted the full number of 60,000 shares to fit and proper

The bill stated (amongst other things) that, at a meeting called pursuant to a resolution of the House of Commons, the defendants had, by undue means, procured a majority in favour of their proceedings in Parliament, and brought in a bill for the formation of a part only of the original line; and that, in order to comply with the Standing Orders, 955 shares had been nominally subscribed for. It was, however, charged that the names of such subscribers were unknown to the plaintiffs, although it was stated, in another part of the bill, that each subscriber to the Parliamentary contract (a copy of which had been taken by the plaintiffs) must affix thereto his name, address, and description.

To this bill the defendants demurred, for want of equity and parties generally; misjoinder of plaintiffs; and also because no parties to represent the majority at the meeting were before the Court:—*Held*, by Lord Chancellor, affirming the judgment of Vice-Chancellor *Knight Bruce*, that the demurrer must be overruled.

persons, and to have raised the whole amount of the proposed capital of £1,500,000.

That the objects of the Company as set forth in the prospectus were very beneficial, and each of the plaintiffs applied for and obtained allotments of a certain number of shares, and paid the deposit thereon, and executed the Parliamentary contract and subscribers' agreement on the faith that the whole number of shares had been allotted, and that the Company would be formed and conducted upon the terms of the prospectus, and that they had not any ground to believe or suspect that a proper allotment had not been made.

That they had lately discovered, that the committee, instead of allotting the whole number, had allotted only 36,000 shares, whereof 17,840 had not been accepted, nor the deposits paid; and that, in fact, 18,160 shares only had been accepted, and the deposits paid, amounting to £47,670.

That the defendants refused to produce the subscribers' agreement, but plaintiffs had lately procured a copy of the Parliamentary contract from the Private Bill Office of the House of Commons, whereby the committee were empowered to confine their application to Parliament for any part of the main line, to vary the termini, to make junctions, divert, &c., and to fix the capital, or increase and diminish it, to reduce the number of shares, &c.

That, at the date of the Parliamentary contract, the defendants, as the provisional committee of the Company, all knew they had failed to raise the necessary capital, and that it was then wholly out of their power to carry out the objects of the Company as set forth in the prospectus, and that the purposes for which the Company was proposed to be established were frustrated and had become impracticable, and that it was the duty of the committee to have stopped the further prosecution of the undertaking, and have returned to plaintiffs and other shareholders the sum

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of 2*l.* 10*s.* per share, paid by them for the Parliamentary deposit, and to have come to an account in respect of the residue, after deducting a proper proportion for their share of the preliminary expenses; but nevertheless the committee had made surveys, &c., and incurred expenses which were useless and improper.

That the committee, under colour and pretence of the provisions contained in the Parliamentary contract, applied to Parliament for an act for constructing a small portion of the line originally intended, and a bill for that purpose was introduced into Parliament and passed the House of Commons, but was rejected in the House of Lords, and had been since withdrawn and finally abandoned.

That five of the provisional directors, upon the introduction of the bill into Parliament, in pursuance of the standing orders, had paid into the Bank £39,000, and had then lately obtained an order for payment out of Court of that sum to three of their number.

That the line of railway for which the bill was presented was not that for the construction of which the Company was established, but only a small and insignificant part (38 miles out of 115); and that the bill was, in fact, rejected, on the ground that there was not evidence of sufficient traffic to support it.

That the plaintiffs became subscribers on the faith of the prospectus, and that the line applied for was not authorised by it, and was a fraud upon the plaintiffs; and the defendants ought not to be allowed the costs of the application to Parliament, which was unwarranted and improper; and as evidence thereof, the bill charged, that, at the date of the Parliamentary contract, the defendants had failed to raise the capital necessary for forming the Company proposed by the prospectus, and well knew they were unable to do so; and that they had reduced the amount of capital.

And as further evidence that the application to Parlia-

ment was fraudulent as against plaintiffs, the bill charged that, by the standing orders of Parliament, the defendants, or the promoters of the railway, were obliged to deposit in the Private Bill Office the Parliamentary contract executed by the plaintiffs and the other shareholders of the Company; and it was required by these orders that it should contain the Christian and surname, description and place of abode of every subscriber, &c., and the defendants accordingly deposited the contract; but inasmuch as the bonâ fide subscriptions to the same were insufficient to shew that the necessary amount of capital had been subscribed for, the defendants, in fraud, procured the contract to be subscribed by themselves and divers other persons for 3,515 shares. That no shares in respect of such subscriptions had been issued, and that 955 of these shares had been subscribed for nominally by various persons who had never paid any deposits thereon, and that the names of such persons were unknown to the plaintiffs.

That a meeting of the scripholders of the Company was convened and held on the 22nd of May, 1846, whereat the plaintiffs and numerous other shareholders on whose behalf the plaintiffs sued, caused their votes to be recorded against proceeding with the bill; but the defendants, by means of scrip certificates which they had purchased or caused to be held by persons under their influence, and by various undue means, procured a majority of votes to be recorded in favour of proceeding in Parliament.

The bill, after alleging a pretence by the defendants that the majority sanctioned the proceedings in Parliament, charged that, prior to the meeting, the defendants had purchased or procured to be purchased, for small sums of money, a large number of scrip certificates, and that they in fact carried a resolution in favour of proceeding with the bill in Parliament by means of the said scrip certificates so purchased and procured to be purchased.

That the defendants had committed a breach of trust and

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duty towards the plaintiffs and the other shareholders on whose behalf the plaintiffs sued, in making the application to Parliament, and that such application was, under the circumstances, unwarranted and improper. The bill, [amongst other charges on which portions of the prayer were founded], charged that the number of the shareholders in the Company was so great, and the rights and liabilities so subject to change and fluctuation by death and otherwise, that it would not be possible, without the greatest inconvenience, to make them parties to the suit, and so to do would render it impossible to bring the suit to a termination; and that the interests of the shareholders, except the defendants, were identical with those of the plaintiffs, and none of them had interests adverse to, or differing from, those of the plaintiffs, and were fully represented by and had a common interest with them, and, in fact, consented and agreed to the relief prayed.

The bill prayed, that it might be declared, that the object and purposes for which the said Railway Company was proposed to be established, had failed through the neglect and misconduct of the defendants; and that they were not justified in prosecuting the said undertaking after the failure thereof; and that they were not entitled to pay, deduct, or retain out of the funds of the Company any expenses incurred in prosecuting the undertaking subsequently to the failure; and that an account might be taken, &c. of all monies received by the defendants, or &c., on account or on behalf of the Company, and of their application thereof; and that the defendants might be charged with and ordered to repay all monies which should appear to have been improperly paid by them out of the funds of the Company; and that an account might also be taken, &c. of all costs, charges, and expenses properly incurred, paid, or sustained by the defendants or on their behalf as the provisional committee of management of the Company, or in or about the conduct and manage-

ment of the affairs of the Company and the promotion thereof, and that the plaintiffs and the other shareholders in the said Company, on whose behalf the plaintiffs sued, might be declared liable to contribute such proportion of the amounts of the said expenses as the number of shares held by the plaintiffs and such other persons bore to 60,000, the whole number of shares into which the capital of the Company was proposed to be divided, or such other proportion of the expenses as the Court should, under the circumstances, declare to be just; and that the proportion of the expenses to be attributed to the shares held by the plaintiffs and the other persons on whose behalf the plaintiffs sued might be deducted out of the monies paid by way of deposit on the said shares, and that the residue of the deposits might be paid to the plaintiffs and the other shareholders on whose behalf the plaintiffs sued; and that an account might be taken of the monies and funds of the Company then remaining in the hands or at the disposal of the defendants, including the sum of £30,000 in the Bank of England to the account, &c.; and that the said monies and funds might be applied in payment of the debts and liabilities properly incurred by the defendants on behalf of the Company (if any), which then remained outstanding, and that the residue might be paid and applied in aid of the objects of the suit, in such manner as the Court should direct. And the bill also prayed a receiver, and in the meantime that the defendants might be restrained from receiving or demanding payment of any of the outstanding monies or assets, or from paying or assigning, or in any manner parting with, any of the monies or assets of the said Company which were then in their possession, and in particular that the defendants, R. Page, J. C. Cobbold, and Wm. Gee, might be restrained from receiving or obtaining payment of the sum of £30,000 then in the Bank of England, &c.

To this bill all the defendants demurred generally, for want of equity and for want of parties; and also for that the plaintiffs had not, by their bill, stated a case entitling them

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to sue on behalf of themselves and all other persons being shareholders in the joint stock company or partnership in the bill mentioned, except the defendants; and also that they had not made parties to the bill the persons who constituted the majority at the meeting of May, 1846, or any persons representing such majority or any part thereof.

Mr. *Russell* and Mr. *Speed*, in support of the demurrer. —Although the bill does not in words pray a dissolution, yet the whole object and scope of it is to wind up and settle the affairs of the Company. It prays a declaration that the purposes and objects of the Company have failed; and also, not merely that the partnership funds may be applied in a certain manner (so as to bring it within the principle of *Wallworth v. Holt* (a)), but further, that the accounts may be taken, and the surplus distributed among the subscribers. If a decree be made in accordance with this prayer, it must have the same effect as a decree made in a suit wherein a dissolution is actually prayed. If this be the effect, the rights of the shareholders *inter se* must be determined, and they must be individually before the Court: *Richardson v. Hastings* (b); *Walburn v. Ingilby* (c); *Long v. Young* (d); *Van Sandau v. Moore* (e); *Evans v. Stokes* (f). In every case where some of the partners have been permitted to sue on behalf of the others, as in *Pearce v. Piper* (g), *Hichens v. Congreve* (h), *Cockburn v. Thompson* (i), *Gray v. Chaplin* (k), *Small v. Attwood* (l), *Taylor v. Salmon* (m), there was a community of interest existing between all the plaintiffs, and the relief prayed was for the benefit of all; but there is a clear distinction between those cases and the present, inasmuch as they all contemplate a continuance

(a) 4 My. & Cr. 619.
 (b) 7 Beav. 301.
 (c) 1 My. & K. 61.
 (d) 2 Sim. 369.
 (e) 1 Russ. 441—465.
 (f) 1 Keen, 24.

(g) 17 Ves. 15.
 (h) 4 Sim. 420.
 (i) 16 Ves. 321.
 (k) 2 Russ. 126.
 (l) 1 Yo. 407.
 (m) 4 My. & Cr. 134.

of the partnership business, or are suits carried on by partners against third parties; or if, in some of the cases, certain of the defendants were partners, the bill was not filed against them in that capacity.

It is charged by the bill that the project has failed through the mismanagement and misconduct of the plaintiffs; and it may be a question, whether the plaintiffs have not mistaken their remedy by coming to a court of equity, when each of them has a right to sue at law for the return in full of his deposits; at all events, it cannot be taken as proved that unanimity exists as to the allowance of any of the expenses incurred by the provisional committee, so that the plaintiffs cannot properly be said to represent the dissentients. The persons constituting the minority at the meeting of the 22nd May have clearly conflicting interests with those who voted for proceeding in Parliament, and they seek by the bill to fix those persons constituting the majority with some portion of the expenses incurred by the resolutions passed at that meeting: *Richardson v. Hastings*, (before cited), *Richardson v. Larpent* (a), *Lund v. Blanchard* (b), *Jacob v. Lucas* (c).

In the next place, the bill alleges, that 955 shares were subscribed for by persons who never paid the deposits thereon,—such persons cannot be represented by those who have actually contributed,—the latter have a certain interest in the distribution of a fund to which the others have not contributed, and may or may not be liable to contribute. The allegation in the bill, that the plaintiffs cannot make all the subscribers parties by reason of their names &c. being unknown to them, is clearly insufficient, inasmuch as by the bill they admit that they obtained a copy of the Parliamentary contract, which contains a list of the names, description, and abode of each subscriber: *Wilson v. Stanhope* (d), *Sharp v. Day* (e).

(a) 2 Yo. & Coll. 507.

(b) 4 Flare, 9.

(c) 1 Beav. 441.

(d) Ante, p. 251.

(e) Id. p. 261.

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Mr. *Rolt* and Mr. *Daniell*, who appeared in support of the bill, were not called on.

His Honor, KNIGHT BRUCE, V. C., at the close of the defendants' argument, remarked, that his impression was, that the demurrer must be overruled; but he would give his judgment after looking through the bill.

Nov. 28th. On this day His Honor handed to the parties the following written judgment:—

Since the cause was argued on behalf of the defendants, I have read the brief bill furnished to me, and a copy of the demurrer. Having considered them, I continue to be of opinion, that the bill states a case for equitable relief, and that it contains allegations and charges, which, upon principle, and on the preponderance at least of authority, are sufficient to sustain it against a demurrer for want of parties. I consider myself bound to overrule the demurrer. I think it should be overruled in the ordinary way, but that the defendants should have six weeks' time to answer. If the plaintiffs object to the defendants having that time, I will hear counsel upon the question.

The demurring parties appealed.

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Mr. *Speed*, in the absence of Mr. *Russell*, pursued the same line of argument as in the Court below.

In the course of the argument, the LORD CHANCELLOR observed, with respect to one of the points made by the appellants, viz. that the bill sought in effect a dissolution of the partnership, and that consequently all the partners were necessary parties, that the express ground of the decision in *Richardson v. Hastings* (a) was, that it appeared

(a) 7 Beav. 301.

upon the face of the bill, that questions might arise in winding up the concern, in which the plaintiffs and those whom they professed to represent might have conflicting interests, the inference from which was, that, if the Master of the Rolls had had a case similar to the present one to deal with, he would have overruled the objection. His Lordship observed, that, in no case can a person sue on behalf of others unless what he sues for is beneficial to all whom he represents as well as to himself; therefore, he cannot obtain a decree to rescind a contract of partnership, because it is not certain that the contract may not be beneficial to some; but in this case no contract exists, for the Parliamentary contract contemplated an act of Parliament being obtained in the ensuing session, and the attempt to obtain one having failed, the contract is at an end, together with the purpose for which it was entered into.

Mr. *Rolt* and Mr. *Daniell* appeared for the respondents; but

The LORD CHANCELLOR said, that, before he called on the other side, he would read over the bill: that the case was one in which the Court might be under the necessity of extending the usual rule which regulated the institution of suits by some persons on behalf of themselves and others; for, if the objection for want of parties (and the demurrer resolved itself into that) were to prevail in this case, it was evident there would be no remedy at all, and the defendants would be able to keep the money they had obtained in their pockets, and set the contributors at defiance. In such a case, his Lordship said, he should struggle to extend the rule if necessary; but that, according to his present impression, it would not be necessary, for that there were already authorities which would justify the Vice-Chancellor's order.

On the following day

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The LORD CHANCELLOR delivered his judgment.—In this case the grounds assigned for the demurrer were want of equity and want of parties; and the want of parties was stated to be, that all the shareholders had not been made parties, the bill being by certain shareholders on behalf of themselves, and all the rest except the defendants. But, in the course of the argument, the objection was varied from what it was on the face of the demurrer, for not only was the objection on account of the absence of those parties insisted on, but it was contended that, at all events, a class of persons who represented 955 shares, which had been subscribed for under particular circumstances, ought to have been parties to the suit.

Now, the outline of the case is one which, but for certain special circumstances, which are stated in the bill, is admitted not to be open to demurrer. The bill states, that a plan was suggested for making a certain railway, under which many persons came in as subscribers, and amongst others the plaintiffs. That a large sum of money was subscribed, but that the attempt to obtain an act of Parliament failed, and that the scheme is now entirely at an end, from the impossibility of raising sufficient capital to carry it into effect. The purpose, therefore, for which the parties came together is stated in the bill as no longer an existing purpose. The bill prays, after some directions as to disallowance of certain expenses to the defendants, that the surplus may be divided among the shareholders in proportion to the sums subscribed by them.

Now that, apart from the special circumstances, is nothing more than the case of *Wallworth v. Holt*, in which, after reviewing all the authorities, I came to the conclusion that the rules of the Court permitted the plaintiff to sue on behalf of himself and others—therefore, it is clear that on that general ground the demurrer cannot be sustained.

But then, it is said, that, by reason of some special circumstances in the case, certain persons cannot be supposed to be

represented by the plaintiffs; these circumstances are comprised in two distinct allegations. The bill represents the conduct of the defendants to have been very improper towards the plaintiffs and the other shareholders, in persisting in the scheme after they knew it had become impracticable; and among other things it states, that, notwithstanding they had at an early period ascertained that it would be impossible to obtain an amount of subscriptions sufficient to enable them to obtain an act, they represented to the public that the subscription was full, and that, for the purpose of making that appear, they procured the Parliamentary contract to be subscribed by a number of their friends for 955 shares, being the number that was wanting to make up the required amount: but (and that is the charge on which the objection is founded) that those subscriptions were merely nominal, and that no shares or certificates of shares representing them were ever issued to or taken by the subscribers, and that no part of the monies which by the Parliamentary contract were represented to be paid by way of deposit upon them, was in fact ever paid.

The statement, therefore, is, that, in order to make up the number of subscriptions for shares required by the standing orders, certain shares were represented as taken up by persons who never paid their subscriptions, or intended to do so; and upon that it is said those persons ought to be defendants, because, being parties to a breach of trust, their case is not common with that of the defendants; and therefore, if they have any interest it cannot be represented by the plaintiffs who complain of that breach of trust.

But then there is an allegation that the plaintiffs do not know their names; and it is not disputed that, in an ordinary case, that allegation is a sufficient excuse for not making such parties defendants. But it is said that here the allegation cannot be true, because the Parliamentary contract, of which the plaintiffs have a copy, shews who they are. The Court cannot try the truth of an allegation upon

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demurrer ; and therefore, for the present, it must be taken as alleged, that the plaintiffs are ignorant of the names of those parties, and consequently excused from making them defendants.

The other special circumstance relied on is very much of the same character. The bill states, that, pursuant to a resolution of the House of Commons during the last session, a meeting of the shareholders was called, to consider whether the scheme should go on or not, “ and that the plaintiffs and numerous other shareholders caused their votes to be recorded at that meeting against proceeding with the bill ; but that the defendants by means of scrip certificates which they had purchased, or caused to be held by persons under their influence, and by various undue means, procured a majority of votes to be recorded in favour of proceeding with the bill ; ” and, after suggesting a pretence that a majority of the shareholders sanctioned and approved of the bill, and authorised the defendants to proceed with it, the bill charges the contrary to be true, and that “ the defendants had, prior to the meeting, and in order to enable them to obtain an authority to proceed with the bill, purchased or procured to be purchased for small sums of money, a large number of scrip certificates of shares in the Company, and to an amount sufficient to enable them to carry a resolution at the meeting in favour of proceeding with the bill, and they in fact carried such resolution by means of the scrip so purchased and procured to be purchased.”

Now, so far as the defendants themselves purchasing shares, and thereby acquiring more influence at the meeting than they ought to have had, or would otherwise have had, that is merely an allegation affecting the conduct of the defendants themselves ; but the argument is, that all those who constituted the majority should be parties to the suit, and that they cannot now dispute the propriety of those proceedings or of the expenses incurred in consequence of them. But to sustain that objection ; it must be shewn

that the bill contains allegations which would constitute an answer to any relief prayed on behalf of these parties.

It may ultimately be made out by the defendants that certain of the persons who are by this bill associated with the plaintiffs, were concerned with them (the defendants) in the acts complained of; and if such a case be made out, it may no doubt hereafter create considerable difficulty in the prosecution of this suit. But that is not now the question; the question is, whether the allegations on the face of the bill shew a clear participation in a breach of trust by these parties. They may have been induced to vote in that majority by the misrepresentations alleged by the bill to have been made by the directors respecting the affairs of the Company, and they may say that they are not precluded by a vote so given from seeking relief in common with the rest of the shareholders against the consequences of the proceedings which were resolved upon at that meeting.

These are the only circumstances which have been suggested, as preventing the plaintiffs from filing their bill on behalf of themselves and other shareholders; and as I am of opinion that neither of these objections can be supported, I think the demurrer was rightly overruled, and that this appeal must be dismissed with costs.

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BEFORE THE VICE-CHANCELLOR OF ENGLAND AND
THE LORD CHANCELLOR.

7th May.

COOPER v. WEBB.

In a bill, framed in all other respects like that in the last case (a), but containing distinct allegations, that, on an application made to Parliament failing, it had been declared that the adventure had terminated, and that advertisements had been published, stating that the deposits would be returned, and also charging that a great number of shares had been allotted by the defendants to the directors of other Companies, on which no deposit had been paid, in consideration of shares given by them for the defendant's benefit:—*Held*, that such a case was not to be distinguished from the preceding one, and judgment of V. C. of England disallowing a demurrer for want of equity and parties, confirmed with costs.

THE bill in this case was filed by J. D. Cooper, one of the shareholders in the York and Lancaster Railway Company, on behalf of himself and the other shareholders in the Company other than the defendants.

To this bill several of the defendants demurred; and seven grounds of demurrer were assigned:—1st, want of equity; 2nd, because all the shareholders other than plaintiff were not parties; 3rd, because the provisional directors were not parties; 4th, because all the shareholders who had executed a release to the directors in respect of their deposits were not parties; 5th, because the trustees of the subscribers' agreement and parliamentary contract were not parties; 6th, want of interest in the plaintiff; and, 7th, conflicting interests in many of the shareholders.

These demurrers were argued by Mr. *Bethell*, Mr. *Stuart*, and Mr. *Welford*; and Mr. *J. Parker* and Mr. *Speed* appeared in support of the bill.

His Honor gave judgment as follows:—

It was stated to me that this case of *Cooper v. Webb* was almost a counterpart of *Apperley v. Page*. And when I heard this argument upon the demurrer of *Cooper v. Webb*, I confess, my opinion was very much against the demurrer; but at the same time, as there was this most important statement made, viz. that the bill in *Cooper v. Webb* was avowedly and designedly put in its present form, in order that it might have infused into its own nature all the vital and saving properties which were found to exist in the bill in *Apperley v. Page*, I thought it right to read over the bill in *Apperley v. Page*, that is to say, I compared *Apperley v. Page* with *Cooper v. Webb*, and if ever there was a case

(a) Preceding case.

in which one precedent coincided with another, this is the case, because, excepting the particular facts which of necessity would be different in the two cases, I cannot see a particle of difference between the general case in *Apperley v. Page*, and the general case in *Cooper v. Webb*; and I also read the published report of the case, and it does appear to me that I am absolutely bound by the decision in *Apperley v. Page*, even if my own opinion did not, though in fact it does, concur with the judgment given in that case; and therefore I shall overrule the demurrer.

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From this judgment the demurring parties appealed.

[The bill in this case, however, contained distinct allegations that application had been made to Parliament for an act, which application had failed, and thereupon it was declared that the adventure had terminated, and advertisements had been published, stating that the deposits would be returned on certain terms, and subject to certain deductions; it also contained charges that the defendants had improperly and fraudulently allotted, or otherwise disposed of, a great number of shares in the said Company to the directors of other Companies for constructing railways, in consideration of shares in such other Companies being allotted to them the said defendants for their own benefit and advantage, and that no monies were ever paid by way of deposit on or otherwise in respect of the shares which the said defendants so allotted to the directors of other Companies as aforesaid, although the same, or the letters of allotment or scrip for the same, were sold in the market; and that the value of the shares so allotted as last aforesaid amounted to a very large sum of money, which was thereby lost to the plaintiff, and the other shareholders of the said Company on whose behalf the plaintiff sued, through such fraudulent allotment.]

Mr. *Stuart* and Mr. *Welford*, for the appellants.

Mr. *J. Parker* and Mr. *Speed*, for the respondents.

In addition to the cases cited in *Apperley v. Page*, it was

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contended on behalf of the appellants, that this case differed from it, inasmuch as the demurrer in that case was general; and the fact of the plaintiffs being entitled to some of the relief prayed, sustained the bill against the demurrer. And also that the charges with respect to the allotments of shares to other directors in consideration of their allotting shares to the defendants, made the allottees of the shares participators in a fraud, for which they were jointly liable with the present defendants, and therefore the demurrer for want of parties ought to be allowed.

The LORD CHANCELLOR.—It seems to me very clear that this case comes within the cases already decided. My reason for calling upon Mr. *Parker* was, that there was a passage in the bill which I had not had pointed out to me, which shewed that the adventure had ceased. There is an allegation that the adventure had ceased; that application had been made to Parliament, which application had failed, and thereupon it was declared that the adventure had terminated, and advertisements were inserted in the papers stating that deposits would be returned: such is the allegation. As to the directors of the other Companies, it appears to me that the allegation with regard to them is introduced for the purpose of making out a case against those who were directors in this Company, shewing the mode in which those who are the alleged directors misconducted themselves to the cestui que trusts. If they have done so, they have incurred a responsibility which, in the progress of the cause, must be established, to make them liable for some contribution for the benefit of the joint shareholders—a contribution which those who purchased shares from them would be just as much entitled to partake of, as those who in the commencement of the Company bought the shares in the market. Therefore, on both points, the attempt to distinguish this case from the other cases referred to is not successful, and consequently, in my opinion, the Vice-Chancellor's judgment was right, and this appeal must be dismissed with costs.

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BEFORE VICE-CHANCELLOR KNIGHT BRUCE.

STIKEMAN v. DAWSON.

*Feb. 20th,
March 5th.*

THE bill in this case was filed by Messrs. Stikeman & Barry, sharebrokers, against John Dawson, and his son, John Kiddell Dawson, and Messrs. Middleton & Barber, the sharebrokers of the son. The facts of this case, as set forth in the pleadings and evidence, were as follow:—

In July, 1841, J. K. Dawson being then twenty-one years of age, and entrusted by his father, J. Dawson, with the care of the cash accounts of his business as wine merchant, lent upwards of £200 to one Surridge, through whom he became acquainted with a clerk of Messrs. Middleton & Barber, sharebrokers, at Liverpool, and also with Mr. Middleton. By these persons great prospects of gain, to arise from speculations in railway shares, were held out to J. K. Dawson, who, in the expectation of being able by these means to replace the money secretly lent to Surridge, was induced to employ Middleton & Barber to traffic in shares for him to a great extent, whereby he became indebted to them in a large sum, and being pressed for payment, he agreed to transfer to them all the shares of which he was then possessed, including forty-five quarter-shares in the Leeds and Manchester Railway Company, of which he was the registered owner.

M. & B., sharebrokers, the holders of certain Railway shares, registered in the name of J. K. D., sold them by their agents to S. & Co., on account of H. The purchase-money was paid to M. & B., and retained by them in liquidation of a debt alleged to be due to them from J. K. D. previously to the sale. Certificates of the shares and a transfer deed, dated June, 1842, were delivered to Messrs. S. & Co., by M. & B., but on application by H. to the Railway Company to be registered, they refused, on the ground that they had received notice

that J. K. D. was a minor at the time when he executed the transfer deed.

S. & Co. filed a bill against M. & B. and J. K. D., and his father, not alleging that M. & B. were cognisant of the nonage of the son, but charging that he was of age, and that M. & B. held him out to be and considered him of full age.

The bill prayed relief on the ground of fraud, but no case of misrepresentation on the part of J. K. D., or of his acquiescence after becoming of age, was established on the pleadings.

Held, that the bill be dismissed without prejudice to any other action or suit, and without costs as to the son, with costs as to the father, and, under special circumstances, with £10 costs as to M. & B.

Quere, whether, if an objection had been taken on the ground that H. was not a party, it would not have been allowed.

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The bill stated that the last-mentioned shares had been purchased by J. Dawson, the father, and registered by him in the name of his son in order to avoid all liability in respect of them; that J. Dawson claimed an interest in the shares, and combined with his son in order to deprive the plaintiffs of the benefit of them.

The defendants, Middleton & Barber, by their agents in London, on the 7th of June, 1842, sold the forty-five quarter-shares to the plaintiffs on account of one Hoole, and received the purchase-money (as stated in the bill, in satisfaction of their debt), and thereupon the certificate of the shares, and a transfer deed, dated the 14th of June, 1842, executed by J. K. Dawson, were delivered to the plaintiffs.

In September following, Hoole applied to the secretary of the Railway Company to be registered as the owner of the forty-five quarter-shares, but was informed by him that his application could not be complied with, in consequence of a notice sent to the Railway Company by J. Dawson, the father, desiring them not to register the transferee of the shares, on the ground that J. K. Dawson was not of age at the date of the alleged transfer.

It was also stated by the bill that the plaintiffs had repaid Hoole his purchase-money for the shares, and that he had assigned to them all his interest therein; and also that they, the plaintiffs, had commenced an action against the defendants, Middleton & Barber, which they had withdrawn, in consequence of doubts as to their solvency. The bill further stated, that J. K. Dawson had brought an action against the plaintiffs for the certificates of the forty-five shares, in respect of which sixteen new shares had then lately been allotted to J. K. Dawson. The bill charged, among other things, that J. K. Dawson was of age at the date of the transfer, and had for some time previously thereto entered into large speculations in railway shares, and in such dealings had held himself out to the world as a

person of full age; and that, from his appearance and conduct, he was generally considered, at Liverpool and elsewhere, to be of full age, and capable of attending to business. That the defendants, Middleton & Barber, had, previously to the date of the transfer, acted as agents to J. K. Dawson; and that they considered him and held him out to be of full age, and capable of contracting for the purchase and sale of shares; and that he had been treated by his father as of full age. The bill prayed that it might be referred to the Master to inquire whether J. K. Dawson was an infant at the date of the transfer; that if it should appear that he was an infant at such date, it might be declared that his conduct was fraudulent; and also that by his acquiescence in the transfer after attaining his majority, he was bound by it; and that he might be decreed to make an effectual transfer to the plaintiffs. The bill also prayed that it might be declared that Messrs. Middleton & Barber had committed a fraud, and that they might place the defendants in the same position as if the shares had been sold to them, and the transfer been valid.

The plaintiffs did not enter into evidence, but the facts as to the sale of the shares, payment of the purchase-money, and refusal of the secretary of the Railway Company to register the shares on account of the notice, were admitted by the defendants.

Messrs. Middleton & Barber by their answer stated that they had acted as sharebrokers for J. K. Dawson, that he appeared to be twenty-two or twenty-three years of age, and that they considered him of that age, and had no doubt of his being, and believed him to be, of full age during all their dealings with him.

[The defence of the several defendants, and the evidence in support of it, are fully stated in the judgment.]

Mr. *Wigram* and Mr. *Malins*, for the plaintiffs, cited *Eyre*

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Earl of Buckingham v. *Drury* (d), *Lord Teynham* v.
Webb (e), *Beckett* v. *Cordley* (f), *Clarke* v. *Cobley* (g), *Cory*
v. *Gertcken* (h), *Overton* v. *Banister* (i).

Mr. *Bacon* and Mr. *Eddis*, for the defendants, J. K. and
J. Dawson, cited *Ex parte Watson* (k).

Mr. *Russell* and Mr. *J. Bailey*, for Messrs. Middleton &
Barber.

The VICE-CHANCELLOR.—In this case, if either of the
defendants had objected, at the hearing, to the frame of
the suit, as defective in point of parties, it is very possible
I should have acceded to the objection, upon the ground
of the absence of Mr. Hoole from the record. But that
course was not taken, and I did not consider it incumbent
upon the Court to decline to hear the cause in its present
state. It may be convenient to consider it, in the first
place, as it is—a suit between the plaintiffs and Messrs.
Middleton & Barber. In that respect, what decree it
would have been right to make, if the bill had alleged that
either of them, on or before the time of the call, or before
the time when the purchase-money was paid, were cogni-
zant of the infancy of J. K. Dawson, it is not necessary
for me to intimate any opinion; for the bill does not so
allege. The language is this: “And the defendant J. K.
Dawson pretends and alleges, that he was an infant under
the age of twenty-one years at the time when he executed
the transfer of the forty-five quarter-shares to John Hoole,

(a) 2 Eq. Ca. Abr. 488.

(b) 9 Mod. 35.

(c) 9 Vin. Abr. 415.

(d) 3 Bro. P. C. 492.

(e) 2 Ves., sen., 198.

(f) 1 Bro. C. C. 358.

(g) 2 Cox, 173.

(h) 2 Madd. 40.

(i) 3 Hare, 503.

(k) 16 Ves. 266.

for the valuable consideration hereinbefore mentioned; and that the transfer is utterly null and void, on account of such infancy, and ought not to be enforced against him; the contrary of all which pretences the plaintiffs charge to be the truth. Charge, that the defendant J. K. Dawson was of full age at the time when he executed the transfer bearing date 14th of June, 1842;—charge, that, for a considerable time prior to the date of the execution of the transfer, the defendant J. K. Dawson had had considerable dealings, and had been engaged in large speculations in railway shares, especially in the South-Eastern and Dover Railway. Charge, that, in all such dealings and speculations he held himself out to the world as being of full age; and that, from his personal appearance and general conduct in matters of business, he was generally considered by mercantile persons, at Liverpool and elsewhere, to be of full age, and to be capable of dealing and speculating in railway shares, and of attending to business on his own account. Charge, that the said defendants, Messrs. Middleton & Barber, as such brokers and partners as aforesaid, had, for some time previous to the 14th June, 1842, acted as the agents to the said defendant J. K. Dawson; and that, in all business transactions conducted by them on account of the said defendant J. K. Dawson, they considered him to be, and held him out to the world as being, of full age, and capable of contracting for the purchase or sale of shares of different descriptions.” The answer of Messrs. Middleton & Barber contains these statements:—“They admit that these defendants, as such brokers and partners as aforesaid, had, for some time previous to the 14th of June, 1842, acted as the sharebrokers or agents of the said defendant J. K. Dawson in many, though not in all, of the transactions in which he had been engaged: and that, in all of the business transactions conducted by them on account of the said defendant J. K. Dawson, they did consider the said defendant J. K. Dawson to be of full age, and capable of

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contracting for the purchase or sale of shares of different descriptions: but these defendants say, that, inasmuch as these defendants had no doubt that the said defendant J. K. Dawson was at such times of full age, the said defendant J. K. Dawson having, at the date of the said transfer, the appearance of a man of twenty-two or twenty-three years of age, these defendants never thought of speaking of his age to any person in the course of such transactions, and, save as aforesaid, these defendants deny that they did hold him out to the world as being of full age, or capable of contracting for the said purchase or sale of shares of different descriptions. Say, they believe, that the said defendant J. K. Dawson was of age at the time when the various transactions in the said bill mentioned took place between the said defendant J. K. Dawson and these defendants. Say, that these defendants were not aware of, and that they did not conceal the fact of the infancy of the said defendant J. K. Dawson at the time when they entered into different contracts on his behalf, or any of them, if the said defendant J. K. Dawson was, in fact, an infant at the time of entering into such contracts, or any of them. Say, that they these defendants were not guilty of fraud in concealing the fact of the infancy of the said J. K. Dawson from the said John Hoole, or the said plaintiffs, as his brokers or agents, these defendants never having concealed such infancy, and not having been aware of such infancy, if it then existed, and not, in fact, now believing that such infancy did then exist."

Considering the language of this answer, and of the bill, there is not, as I understand, any evidence for or against these two defendants but their answer. I must, I think, dismiss the bill as against Messrs. Middleton & Barber. The plaintiffs' counsel at the bar, indeed, conceded, in effect, that this ought to be done. I do so, however, without prejudice to any action or any other suit, and without intimating any opinion how far or whether they

are liable at law, or may be rendered liable at law or in equity, to the plaintiffs or Mr. Hoole, except that I may, perhaps not improperly, say thus much, that, if it shall hereafter be proved against Messrs. Middleton & Barber that these gentlemen, before they instructed Messrs. Ewart & Bell to sell the shares in question, or before the shares had been sold to Mr. Hoole, were aware, or had been informed, of Mr. J. K. Dawson's infancy, their title to retain the purchase-money, if not otherwise doubtful, may not be considered by any means clear. I should not have thought it right to give them any costs had not the bill contained a suggestion against their pecuniary circumstances. That being so, I give them 10*l.* costs, but no more.

The main question is, whether the plaintiffs are entitled to equitable relief against both or either of the other defendants; and upon this, it may be not quite superfluous to be first satisfied, whether the father's conduct has in any respect been fraudulent or unfair. The bill charges, that, "some time in the month of January, 1844, the plaintiff H. F. Stikeman had an interview with the defendant J. K. Dawson, at which the last-named defendant stated, that the original purchase-money for the said forty-five quarter-shares was the money of his father, J. Dawson, of Liverpool aforesaid, wine merchant, defendant hereto. That defendant J. Dawson caused the said shares to be registered in the name of his son, the defendant J. K. Dawson, in order to divest himself of any liability which might attach to the purchaser or holder of such shares. That defendant J. K. Dawson, for some time previous to the execution of the said transfer bearing date 14th June, 1842, had taken a leading part in the management of the business of the defendant J. Dawson, and had entered into contracts on his behalf, and had in all respects been treated by his said father, as far as regards all matters of business, as if he was of full age. That the defendant J. Dawson has since paid out of his own proper monies, in the name of his son, J. K. Dawson,

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all the calls which have been made in respect of the said new sixteenth shares, which have since been created by the Manchester and Leeds Railway Company, as is hereinbefore mentioned, and which said new sixteenth shares the said company have allotted to the said defendant J. K. Dawson, in consequence of the said forty-five quarter shares being still registered in his name. That the defendant claims to have some interest in, or lien upon, or right of ownership, in the forty-five quarter shares and the eleven sixteenth shares which have been allotted to the defendant J. K. Dawson, as the registered proprietor of the forty-five quarter shares. And the plaintiffs charge, that the defendant J. Dawson has been, and is now, combining with the said defendant J. K. Dawson, and is seeking to deprive the plaintiffs of the forty-five quarter shares, and all advantage or value which has accrued thereon, by means of dividends paid thereon, and new shares allotted in respect thereof."

I have considered these charges: but I have also considered the father's answer and the evidence; and I am of opinion that it is not established, and that I ought not to suspect that his (I mean the father's) conduct has been in any respect fraudulent or unfair. By saying this, however, I do not mean to intimate any opinion whether the shares were purchased by the son with the father's money, or whether the father is entitled to follow any part of the money or property. That point I leave now untouched, assuming for the present that the shares were not so purchased, and that he is not so entitled.

It must next be recollected that it is proved, as between the plaintiffs and the Dawsons, and now conceded by the plaintiffs, that the son did not attain his majority until some time in September, 1842, viz. after Mr. Hoole's purchase-money had been received by Messrs. Middleton & Barber, and he had received the instrument of transfer with the blanks supplied. It is a circumstance which has not been contended at the bar for the plaintiffs, that, on the ground of contract, or

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otherwise than on the ground of fraud, the title of the younger Dawson to the shares in question can be affected in this suit, for, although something was said of confirmation or acquiescence, not any point of the kind was pleaded or pressed, nor was it, on the materials before the Court, capable of being successfully made. Nor, on the part of the Dawsons, has it been contended that the frame of the bill excludes the plaintiffs from relief against the son on the ground of fraud, supposing fraud to be by his answer or otherwise proved against him. Without deciding whether it is or is not so framed, I will assume that it is not,—I assume, therefore, that, if the bill does not allege substantially that on or before June, 1842, J. K. Dawson was aware of his true age, and aware of his civil disability, and his privilege as a minor with respect to a contract of the kind in question, it was unnecessary that the bill should do so.

The plaintiffs' counsel have, in argument, put, and properly put, their case for relief against J. K. Dawson on the ground of fraud, and fraud only. Did he, then, during his minority commit, in respect of the matter in question, a fraud?—that is, a fraud of such a nature as to render him necessarily amenable to this jurisdiction, and so as to entitle the plaintiffs to relief against him on that ground? That is the simple point between the plaintiffs and him.

Now the fraud imputed to him is not that of making a false assertion, or any express misrepresentation at all,—he made none. The fraud imputed to him is that merely of not disclosing the fact of his minority to Messrs. Middleton & Barber; I say to them, because he had not any dealings with the plaintiffs or with Mr. Hoole, except so far, if at all, as the dealings or communications of Messrs. Ewart & Bell and Messrs. Middleton & Barber can be considered, in any sense, as his dealings and communications: nor had he any dealings or communications with Messrs. Ewart & Bell, except so far, if at all, as the dealings and communications of Messrs. Middleton & Barber can be considered, in any sense, as his dealings and communications.

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If J. K. Dawson committed any fraud upon any others than his father, it must be taken to have been a fraud upon Messrs. Middleton & Barber, for the state of the record precludes us from considering them as accomplices of J. K. Dawson in a fraud upon the plaintiffs or Mr. Hoole; nor do I wish to be understood as suggesting that they were. Still frauds and misrepresentations, if any, upon Messrs. Middleton and Barber, may have been of such a nature, and attended by such consequences, as to give the plaintiffs a title to complain of it effectually against the defendant, J. K. Dawson.

Although the imputed fraud is that of not disclosing the fact of his minority, yet it has been said by the plaintiffs' counsel that a fraudulent suppression or concealment may be, and sometimes is, equivalent *civiliter* to a false assertion fraudulently made in express terms. This I am far from denying. I accede to the proposition. But they say, moreover, in effect, that, in the case before the Court, the dealings between J. K. Dawson and Messrs. Middleton & Barber, were such as, from their nature, not to bind an infant unless there were fraud on his part; it was his duty and incumbent on him to apprise them of his minority; that he did not do so, and that, from the nature of the dealings, his omission to do so was equivalent to a denial by him of the fact of minority, and that it was a fraud on his part, for which, notwithstanding his minority at the time, he became answerable in equity after his majority. These are, in truth, the propositions to be tried between him and the plaintiffs, who I assume, without deciding, are the proper parties to raise the points before the Court. For the purpose of considering them, and coming to a conclusion upon them, I have read attentively the pleadings and evidence, and have examined various authorities, including all those cited at the bar, and the case of *Esron v. Nicholas* (a).

Now, first, the proposition that the dealings between J. K. Dawson and Messrs. Middleton & Barber were not

(a) This case is reported nom. *Erroy v. Nicholas*, 2 Eq. Ca. Ab. 489.

of such a nature as to be capable of binding the infant without fraud on his part, is, I suppose, indisputably true. But, secondly, was it his duty, as the word is understood in a court of justice, not to enter upon these dealings without mentioning to them his true age? Without affirming that it was, I will for the present assume that it was so, —although this assumption seems to involve in it, not only that the probable or certain fact of his minority, and likewise its material bearing upon the question of his responsibility, were known to himself; but moreover, that the broker was ignorant of his minority. Such, then, being considered to have been his duty, did he commit any breach of it? Is such a breach proved against him? The plaintiffs must be understood as contending that it is proved against him, on the ground that, as they must be taken to insist, the burthen of proof in this matter lay upon him, and that the proof, as they say, is absent. But did the burthen of proof, as to this, lie upon him?

Generally, it is true, the burthen of proof lies upon the party who affirms, not upon the party who denies, but the rule is not unqualified, nor is it without exception. Neither criminality nor fraud is to be presumed; and though the case of *Williams v. The East India Company*(a), and various others that have preceded and followed it, may not go the whole of the way to establish the point that the burthen of proof lies on the plaintiffs, they may be thought not to be without a bearing upon the subject. The charge against J. K. Dawson is that he fraudulently omitted to give information. Assuming it not to be incumbent upon the plaintiffs to advance material and very strong testimony in support of it, I am not aware of any affirmative evidence against him in support of that charge. Were they entitled to abstain altogether from adducing any evidence? It is true, that it may be said, that a communication, if any, from J. K. Dawson to the brokers, is a fact more peculiarly within

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(a) 3 East, 192.

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his own knowledge, and of which the burthen of proof is, by a general rule, therefore, cast upon him; and this may be so; but the fact itself, as already intimated, and which, indeed, is obvious, is immaterial, unless it be taken, that, independently of any communication from him, the brokers neither knew nor had notice that he was a minor.

The plaintiffs have, indeed, assumed throughout, that, independently of any communication from J. K. Dawson, the brokers did not know of, and had not notice of his minority. But were they entitled to assume it? Is their ignorance of that minority to be presumed, unless the contrary be shewn? “*Qui cum alio contrahit vel est, vel debet esse, non ignarus conditionis ejus,*” forms a maxim of the civil law as understood by the best commentators; that is, the *status* “*an sit pater-familias, vel filius-familias, servus vel dominus (a).*” I am not satisfied, that, as a general rule, the law of England dissents from that. *Primâ facie*, it seems less probable that a man should believe that which is not, than that which is, in the absence of any false assertion. Assuming it, however, possible that there may be transactions in which the mere fact of a young man engaging himself may justify a belief in those with whom he deals that he is not a minor, I think the case is not so with regard to transactions of a nature—I ought not, perhaps, to say the discreditable nature—which existed between the brokers in question and their unlucky customer. Adolescence is at least as much the age of gambling as any other. The answer of J. K. Dawson contains these statements: it is the joint answer of the father and son. They say, that, “previous to and in the month of July, 1841, the defendant J. Dawson, the father of the defendant J. K. Dawson, carried on business as a wine merchant, and he has ever since continued to carry on, and still carries on, such business in Liverpool, in the county of Lancaster; and in the month of July, 1841, J. K. Dawson, being under the age of twenty

(a) Dig. Lib. L., tit. 17, 19, and note.

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years, acted as cash-keeper, and in such capacity had the care and control of the cash in the office or place of business of J. Dawson." J. K. Dawson says, that, "in or about the said month of July, 1841, defendant J. K. Dawson became acquainted with one Henry Surridge, then a dealer in bullion and a discounter of country bank notes in Liverpool, and from and after the commencement of such acquaintance, the said H. Surridge made frequent applications to the said J. K. Dawson to advance and lend him divers small sums of money, varying in amount from 5*l.* to 30*l.*, for which he offered and agreed to pay a high rate of interest; and said H. Surridge at first offered security for such loans, though he afterwards borrowed money of the said J. K. Dawson without giving security. That this defendant J. K. Dawson was, under the circumstances aforesaid, induced to advance various sums to the said H. Surridge out of the office cash belonging to the defendant J. Dawson, and which was in the custody or control of the defendant J. K. Dawson, as such cash-keeper as aforesaid; and some of such advances were duly repaid by the said H. Surridge, and the amount thereof duly accounted for and returned by the defendant J. K. Dawson to the office cash of the defendant J. Dawson; but the said H. Surridge afterwards became irregular as to repayment of the sums advanced to him by the defendant J. K. Dawson, and defendant J. K. Dawson was unable to obtain repayment thereof, though he frequently pressed the said H. Surridge to repay the same; and, in the month of March, 1842, the said H. Surridge was indebted to the defendant J. K. Dawson in the sum of 200*l.*, or thereabouts, in respect of such loans as aforesaid; and the defendant J. K. Dawson was deficient in his cash accounts with his father J. Dawson in the like amount. Says, that, from and after the commencement of defendant J. K. Dawson's acquaintance with the said H. Surridge, the defendant J. K. Dawson was very frequently at the office of the said H. Surridge,

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in Dale-street, in Liverpool aforesaid; and defendant J. K. Dawson was in the habit of meeting there one Richard Cobb, who was then a clerk in the office of Messrs. Middleton & Barber, in the said bill mentioned; and the said Richard Cobb frequently conversed with the said J. K. Dawson, and with H. Surridge in the presence of the defendant J. K. Dawson, about jobbing and speculations in shares, and the opportunity afforded thereby for making a profit, and realising money; and, shortly after the defendant J. K. Dawson became acquainted with the said R. Cobb, defendant J. K. Dawson gave an order to the said Richard Cobb to purchase certain shares on account of the defendant J. K. Dawson, and defendant J. K. Dawson had thereafter several transactions in the purchase and sale of shares with the said Richard Cobb. Says, that, on a certain occasion in or about the month of March, 1842, when the said H. Surridge was so as aforesaid indebted to defendant J. K. Dawson, and the defendant J. K. Dawson had become aware that he should be unable to obtain repayment of the amount due to him from the said H. Surridge; and when the defendant J. K. Dawson was so as aforesaid deficient in his cash accounts with the defendant J. Dawson, the defendant J. K. Dawson met, at the office of H. Surridge, and was introduced to, J. Middleton, in the said bill named as a defendant thereto, and who was then a partner in the said firm of Middleton & Barber. Says, that, upon such occasion as last aforesaid, the said J. Middleton entered into a conversation with the defendant J. K. Dawson relative to shares and speculations therein; and on several subsequent occasions defendant J. K. Dawson conversed with the said J. Middleton on the same subject, and the constant tenor of Middleton's conversations with defendant J. K. Dawson was as to buying and selling shares, and the opportunities afforded thereby for making money. Says, that, under the circumstances hereinbefore appearing, at the time when defendant

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J. K. Dawson became acquainted with the said J. Middleton as aforesaid, defendant J. K. Dawson was very anxious on the subject of the deficiency in his cash account, and was very desirous of replacing the amount withdrawn by him from the office cash of defendant J. Dawson as aforesaid, and of obtaining money for that purpose, and thereby, and by such representation as aforesaid on the part of the said J. Middleton, defendant J. K. Dawson was induced to enter into large dealings and speculations, in the purchase and sale of shares, with the said Messrs. Middleton & Barber, and also into certain dealings and speculations of a similar description with other sharebrokers." As far as I have read, the answer was used in evidence. The answer immediately proceeds thus:—"And the defendant J. K. Dawson was induced to withdraw the money required for such dealings and transactions out of the office cash of defendant J. Dawson, which was in the control and custody of defendant J. K. Dawson as aforesaid, in the hope of being able to replace the same, as well as the amount in which he was previously indebted to the defendant J. Dawson on such account as aforesaid, out of the profits of such transactions. [His Honor then proceeded to read other parts of the answer, which were to the following effect:]—"That J. K. Dawson was under twenty-one years of age during his dealings with Middleton & Barber, up to the time he went to America, on 14th June, 1842, and attained his majority the 14th September, 1842. That his father was not aware until after 14th June, 1842, of the loans made by his son to Surridge, and of the deficiency in his cash account, or of his having had speculations in railway shares; that the dealings with Middleton & Barber took place partly at the office of Surridge, but latterly at the office of Middleton & Barber in Exchange-street East, in Liverpool, distant about thirty yards from the office of Surridge; that the dealings were principally with Middleton, but during the latter part of them with T. Barber,

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the other partner in the firm; that, to the best of the belief of J. K. Dawson, Middleton & Barber, during the dealings, were fully aware that he was a minor, and that Surridge informed Middleton thereof before April, 1842, and cautioned him in respect of his dealings with him J. K. Dawson on that account." I need hardly pause to observe, that this is a statement at direct variance with the statement in the other answer, which I have partially read. "That, during March and part of April, 1842, the contract notes relating to the purchase and sale of shares by J. K. Dawson were usually sent by Middleton & Barber for him at the office of Surridge; but, on a certain occasion in April, Surridge told him that he, Surridge, could no longer permit his office to be so used; and he then told J. K. Dawson, that he had given information and caution concerning his minority to Middleton & Barber. That, in or about May, 1842, a meeting was held in Liverpool of the creditors of G. Gibson; among others was Middleton; and it was then and there said that he, J. K. Dawson, was not of age; and he was asked, within the hearing of Middleton, if such was the fact, when he answered in the affirmative, in the presence and within hearing of Middleton and other persons; but," he added, "that would make no difference, for he should pay what he owed. That, at the latter end of May, 1842, after he had such dealings with Middleton & Barber, or through them, as his agents, they said that he was indebted to them in £300; and they pressed him for payment or security, but they gave him no account, although, on 1st June, 1842, they rendered an account. That, at the time of such alleged balance being due to Middleton & Barber, he was possessed of forty-five quarter-shares in the stock of the Manchester and Leeds Railway Company, the shares now in question, which shares he, J. K. Dawson, had purchased through their broker, Gibson, and he, J. K. Dawson, was the registered proprietor of such shares in the books of the company. That, on

being pressed by Middleton & Barber for payment, he agreed to transfer to them, as a security, those shares, as well as shares in other companies ; and they prepared a certain deed, purporting to be a transfer of the shares, which he executed, and left the same in their possession. That, when he executed the same, to the best of his belief, the name of the purchaser was left blank ; and he believes the date of the deed and the consideration money were also left blank. That, to the best of his belief, the deed was executed by him on the 1st June, and not on the 14th June, 1842, the day it now appears to bear date, and which was the day he left England for America. That, on or about the time he executed the deed, he delivered the certificates of the same shares to Middleton & Barber. That the balance so as aforesaid alleged to be due was represented by Middleton & Barber to be due on account of divers time-bargains and other transactions in shares in the South-Eastern and Dover Railway, into which speculations he had entered by their persuasion, and through their agency, and which speculations consisted of and comprised sales and purchases to a large extent, and sometimes comprising 100 shares in a single transaction ; and on or about the 1st June, 1842, they delivered to him an account relating to certain of the share transactions, which took place as aforesaid." [The account was set out in the answer.] "I believe it to be true that the £100 shares in the said last-mentioned account, described as new Dovers, and also the fifty shares therein mentioned, of the like description, which were respectively shares in the South-Eastern and Dover Railway Company, and with the price of which shares respectively, amounting together to 1419*l.* 7*s.* 6*d.*, the defendant, J. K. Dawson, was, by the said account, debited and charged, as hereinbefore appears, were respectively, in fact, never delivered by the said Messrs. Middleton & Barber to defendant, J. K. Dawson ; and no such shares were ever received, nor was the price thereof, nor any part thereof,

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ever received by, or accounted for, to defendant, J. K. Dawson, except or further than the said Messrs. Middleton & Barber, by the same account, credited defendant, J. K. Dawson, with the sum of £900, thereby appearing to have been borrowed by the said Messrs. Middleton & Barber on the security of the shares therein referred to." And at a later part of the answer they thus speak:—"Admits it to be true;" that is, I suppose, J. K. Dawson admits it to be true, "that J. K. Dawson, for a considerable time prior to the date of the execution of the said transfer, namely, during such period as hereinbefore mentioned, had considerable dealings; and that he had, under the circumstances hereinbefore mentioned or referred to, but not otherwise, engaged in large speculations in railway shares, and especially in the South-Eastern and Dover Railway, and in certain speculations, but not to so great an extent, in other railway shares, which defendant is not able to particularise, as to his knowledge, belief, or otherwise. Denies, that in all such, or any of such dealings and transactions, defendant held himself out to the world as being of full age, or that, from his personal appearance and general conduct in matters of business, he was generally considered by mercantile persons, at Liverpool or elsewhere, to be of full age; and, in fact, it was generally notorious, that defendant was then under twenty-one, and the personal appearance of defendant was such, that he really looked younger than he was; but save as aforesaid, the defendant says he does not know, and cannot set forth, as to his belief, or otherwise, whether defendant was or was not generally considered capable of dealing and speculating in railway shares, or of carrying on business on his own account, or otherwise. Admits, under the circumstances hereinbefore mentioned, said defendants Messrs. Middleton & Barber, as such brokers and partners as hereinbefore mentioned, had, for some time previous to the 14th day of June, 1842, acted as the sharebrokers and agents to defendant; but defendant denies, that, in all or in any of the business transactions conducted by them on account of

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defendant, they considered defendant to be of full age, and capable of contracting for the purchase or sale of shares of different descriptions. Says, that, on the contrary, the said Messrs. Middleton & Barber were throughout well aware that defendant was an infant under twenty-one years of age, and were expressly informed thereof on the occasions and under the circumstances hereinbefore mentioned. Says, that defendant does not know, and cannot set forth as to his belief, or otherwise, whether the said Messrs. Middleton & Barber held defendant out to the world as being of full age, and capable of contracting as aforesaid, save that the contrary thereof was notorious in Liverpool aforesaid; and defendant has no reason to believe or suppose that the said Messrs. Middleton & Barber ever made any such misrepresentation. Denies, that this defendant was of full age at the time when the various transactions in the said bill, and hereinbefore mentioned, took place between the defendant and the said defendants, Messrs. Middleton & Barber; and says, that last-mentioned defendants were aware of the fact of the infancy of the defendant, and, to the best of defendant's knowledge and belief, did not conceal the same at the times when they entered into the different contracts on his behalf."

Of these statements, a considerable part—but I am aware a part only—was read in evidence for the plaintiffs. Miss Ann Kiddell, an elderly lady, a witness upon the third interrogatory, deposes thus:—"I did not see the defendant J. K. Dawson during the year 1842, but, previous thereto, his general appearance, manner, and conduct were those of a person younger than the said J. K. Dawson really was." Mr. Richards or Mr. Rodick, a magistrate, also a witness upon the same interrogatory, says, "I knew and was acquainted with the defendant J. K. Dawson, and frequently saw him during the year 1842, but when I last saw him in that year I cannot recollect. I never had any dealings or transactions with him during any part of that year. I knew the said defendant J. K. Dawson by reason of his visiting

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at my house, and associating with my sons and daughters, and by these means I knew him well. I never knew or was acquainted with his real age: he associated with my two eldest sons, the eldest of whom was twenty-three in the month of August last, and the other twenty-two years of age in the month of July last; and I considered the said defendant J. K. Dawson their junior from his general appearance and manner. The general appearance of the said J. K. Dawson, during such part of the year 1842 as I was acquainted with him, was boyish, and his manner and conduct childish and frivolous. I do not know what the real age of the defendant J. K. Dawson was in the year 1842, and I do not know now what his age was; and I therefore cannot say whether he looked in any degree older or younger than he really was, nor whether his manner and conduct were those of a person older or younger than the said defendant J. K. Dawson really was. I do not know whether, up to any time in the year 1842, the said J. K. Dawson was reputed to be, or was considered to be, under the age of twenty-one years, except that I myself considered him to be, in the year 1842, of the age of about sixteen years, judging from his general appearance and manners, and from his being a mere boy when I first knew him."

Why is the Court to conclude that the brokers, under the circumstances of such a case as this, did not know or believe the truth? It will not, perhaps, be out of place here to refer to the judgment of a distinguished judge in a well-known criminal case: it is the language of Lord *Tenterden* (a), who says, "A presumption of any fact is, properly, an inferring of that fact from other facts that are known; it is an act of reasoning, and much of human knowledge on all subjects is derived from this source. A fact must not be inferred without premises that will warrant the inference; but, if no fact could thus be ascertained by inference in a court of

(a) Then *Abbott*, C. J., in *Rea v. Burdett*, 4 B. & Ald. 161, 162.

law, very few offenders would be brought to punishment. In a great portion of trials, as they occur in practice, no direct proof that the party accused actually committed the crime is or can be given : the man who is charged with theft is rarely seen to break the house or take the goods ; and, in cases of murder, it rarely happens that the eye of any witness sees the fatal blow struck, or the poisonous ingredients poured into the cup. In drawing an inference or conclusion from facts proved, regard must always be had to the nature of the particular case, and the facility that appears to be afforded, either of explanation or contradiction. No person is to be required to explain or contradict, until enough has been proved to warrant a reasonable and just conclusion against him, in the absence of explanation or contradiction ; but when such proof has been given, and the nature of the case is such as to admit of explanation or contradiction, if the conclusion to which the proof tends be untrue, and the accused offers no explanation or contradiction, can human reason do otherwise than adopt the conclusion to which the proof tends ? The premises may lead more or less strongly to the conclusion, and care must be taken not to draw the conclusion hastily ; but, in matters that regard the conduct of men, the certainty of mathematical demonstrations cannot be required or expected."

Now, treating Lord *Tenterden's* observations as applicable to this case, in which, though civil, the charge is, that the minor was guilty of a fraud, it may be asked, whether the facts proved between him and the plaintiffs do not, in the absence of explanation or contradiction, warrant a reasonable and just conclusion that the brokers were not unaware of the minority of their youthful-looking townsman, whom they were in the daily habit of seeing and dealing with,—the son, moreover, of a merchant of the same town ? I am not prepared to say that such a conclusion is warranted, and I repeat, that the question of communication or no communication from him to them

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does not, as I conceive, become material, or arise, until their ignorance of any such communication has been proved or assumed. As, however, it may be questionable whether it ought to be inferred between these parties, that during the transactions in question, or any part of them, Messrs. Middleton & Barber thought J. K. Dawson under age, or had notice of his minority, I proceed to consider the plaintiffs' last position,—their contention, namely, that, on the assumption of the young man's acquaintance with his own minority, and with the law on the subject, and also of the brokers' belief during their dealings with him that he was not a minor, as well as of his omission to communicate the fact to them that he was a minor, there was a fraud on his part, for which, notwithstanding his infancy at the time, he became, or was after his majority, and is answerable in equity.

This is, as I consider, a question of importance and general interest. The civil law defines *dolum malum* to be "*omnem calliditatem, fallaciam, machinationem, ad circumveniendo, fallendum, decipiendum alterum, adhibitam.*" Then (the language is that of Ulpian), *Item in causæ cognitione versari Labeo ait, ne in pupillum de dolo detur actio, nisi fortè nomine hereditario, conveniatur. Ego arbitror, et ex suo dolo conveniendum, si proximus pubertati est, maxime si locupletior ex hoc factus est.*" And the Digest proceeds in the words of Paulus:—" *Quid enim, si impetraverit à procuratore petitoris, ut ab eo absolveretur; vel si, de tutore mentitus, pecuniam accepit; vel alia similia admisit, quæ non magnam machinationem exigunt?*" Then, Ulpian: "*sed ex dolo tutoris, si factus est locupletior, puto in eum dandam actionem: sicut exceptio datur (a).*" And, unquestionably, it is the law of England, that an infant, however generally for his own sake protected by incapacity to bind himself by contract, may be *doli capax* in a civil sense, and for civil

(a) Dig., lib. iv., tit. iii. 1, 13, 14, 15.

purposes, in the view of a court of equity (though, I believe, only when *pubertati proximus* is alleged), and not, I suppose, at so early an age as for criminal purposes, and may, therefore, commit a fraud, for the consequences of which he may be made after his majority civilly answerable in equity. I am not speaking of cases in which infants, if liable at all, are liable at law only, or in which adults are suable at law only in respect of acts done during infancy; but, as far as equity is concerned, the practical application of the rule or doctrine to which I have been referring must not seldom, as I conceive, be a matter of much difficulty or delicacy; and I agree with a learned author, who says, that, "In what cases, in particular, courts of equity will thus exert themselves it is not easy to determine, nor indeed is the jurisdiction of equity the only jurisdiction where difficulties on this subject have arisen or may arise. Courts of law have not been free from them."

The capacity of infants to commit crime,—their punishment for criminal offences,—and their liability civilly for various wrongs, not connected in any sense with contracts, as, for instance, battery and slander, to say nothing of the clear right in some circumstances to maintain trover against them, are of universal recognition. But questions which have not been considered free from difficulty have arisen, whether or how far persons are civilly liable at law for acts, (which, if they were the acts of adults, would be wrongs), supposing them to be done during infancy, and to be connected with contracts.

The case of embezzlement by a servant or an apprentice, *Bristow v. Eastman* (a), that of detinue, *Mills v. Graham* (b), and another in Rolfe's Abr. with respect to an infant master of a ship, are instances of this kind, in which the objection of minority did not prevail; while in other instances, for example the case of *Johnson v. Pie* (c), where it

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(a) 1 Esp. 172. (b) 1 N. Rep. 140. (c) 1 Lev. 169; 1 Syd. 258.

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was ruled, that an action of deceit could not lie by the false assertion of defendant, when an infant, that he was of age. The case mentioned in Keble, of the assertion of an infant, that a false jewel not belonging to him was a diamond, and his own; and the case of the infant innkeeper, in Rolle's Abr., tit. "Actions sur case;" and, in modern times, *Jennings v. Rundall* (a), a case of overriding a hired mare; *Green v. Greenbank* (b), a case where an infant warranted his mare to be sound, well knowing her to be unsound; and the case of exchanging mares, in which cases the objection of minority prevailed.

A case also, in which an infant was plaintiff, may be mentioned as tending much in the same direction, the plaintiff having recovered, though her conduct, if not fraudulent, was very near it, or like it. *Scroggam v. Stewardson* (c) is this: "In trespass by infant by guardian, the defendant pleads that the plaintiff was above sixteen years old, and agreed for 6*d.* in hand that defendant have licence to take two ounces of her hair, to which the plaintiff demurred, and per curiam, it is no plea; for the infant cannot licence, though she may agree with the barber to be trimmed; and judgment for the plaintiff." The same case, somewhat differently given, in Bacon's Abridgment thus:—"In trespass quare vi et armis insultum fecit, et totum crinem capitis ipsius Annæ abscidit, the defendant, as to all the trespass præter tonsuram crinis, pleads not guilty; and as to that, pleads that the plaintiff was of the age of sixteen years, and for a certain sum of money licentiavit the defendant duas uncias crinis dictæ Annæ detondere et abscindere; and upon the demurrer to this plea, the Court held, that the contract was absolutely void, and consequently the tonsure unlawful, and gave judgment accordingly for the plaintiff (d)."

Now, in those instances in which minors succeeded at law,

(a) 8 T. R. 335.

(b) 2 Marsh. 485.

(c) 26 Car. 2; 3 Keble's Rep. 369. (d) 4 Bac. Abr., 367 (7th edit.).

could there have been interposition against them in equity, —a jurisdiction, generally at least, equally considerate with courts of law in favor of infants? Fraud certainly is odious, and is to be repressed, but neither is protection to be withheld from the imbecility of youth. Is not allowance to be made for its exposure and obnoxiousness to influence, temptation, and seduction,—especially in case of legal nonage? Very young men may be seduced into the commission of fraud. Lord *Eldon*, in *Jackson v. Hobhouse* (a), with reference to the case of a married woman, when she commits a fraud, glances at the possibility of the husband compelling his wife to join him in it; and may not some consideration be had for a boy taken in the toils of a designing and experienced man of mature age? By the last sentence, I do not wish to be understood as deciding or as referring to the present matter, as to which, though I do not say that the whole account given, whether accurately or inaccurately, by the young man in his account of the commencement, and progress, and nature of the connexion between him and Middleton & Barber is in evidence against the plaintiffs; yet I cannot but observe, that the bill might have been amended after the answer, and that, with such an answer before the plaintiffs, they have only adduced the evidence which they have (if they have adduced any evidence).

The story told by the answer is, in substance, that this young man had unhappily committed himself so far as to abuse the confidence of his father, to whom he was cash-keeper, and to misapply some sums, not of very inconsiderable amount, belonging to his father. The son was anxious to make good that loss, and tried to do so thus:—Having met Mr. Cobb, clerk of Middleton & Barber, and afterwards Mr. Middleton, at the office of Mr. Surridge, (through whom the defalcation took place), the young man was struck by Mr. C.'s and Mr. M.'s representations of the probability of large

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profits being derived from gambling (or, what is the same thing, speculating, which ever it ought to be called) in shares in public undertakings, and, upon these representations, with a view to deliver himself from his difficulties, he engaged in a series of transactions, which ended in a manner that scarcely required inspiration to foretel. If this statement is substantially true, or even substantially true so far as it agrees with Messrs. Middleton & Barber's representation of the matter; if Mr. Rodick's description of the young man's personal appearance is substantially accurate, and if Messrs. Middleton & Barber, knowing, as it was probable they did know, that the boy had a father living at Liverpool, allowed him to engage in such dealings, and to contract the debt, without making a communication to the father, or asking a question of him, (and no such communication appears to have been made), it may be difficult to account satisfactorily for the conduct of Middleton & Barber; and I think it as difficult to think it likely that they should have been defrauded by the lad, of whom, if the materials now before the Court do not enable me to discover "the wisdom of the serpent," they do not require me to believe his innocence to be that of a pigeon. If the brokers and their adventurous young principal were not on equal terms, there appears little difficulty in the way of saying who was probably the weaker party.

Apart, however, from any peculiarity of circumstances, the plaintiffs seem substantially to contend for not less than this general proposition, that, if a minor deals, in a matter of contract, with a person who, having no notice of his minority, does, without any representation to him on the subject, believe the minor to be of full age; the minor is, after majority, at least answerable in equity to that person for the contract or the consequences, or is liable in equity to be compelled to restore him to his original position. Not referring to any of the cases in which the law permits infants to contract, or to any case where the point is purely

legal, I am not aware that such proposition is founded on principle, or supported by the authorities which bind the Court. It seems to me full of danger and evil, as was said at law in a case already mentioned, where it was held, that an action of deceit would not lie, on the assertion of a minor that he was of full age; and there seems a great deal of practical good sense as well as good law in it. *Johnson v. Pye* (a) is this:—“*Action sur le case pur deceit fuit port, et plaintiff declare que la fuit comunicacion inter le defendant et luy concernant lending al defendant £300. Et sur ceo defendant affirme al plaintiff que fuit de pleine age, sur que le plaintiff lend a lui le argent. Et prist son security lou in verity il ne fuit forsq. 20 et halfe, et issint il void son security demesne. Et le plaintiff p de son argent al damages etc. Et apres verdict pur plaintiff fuit move in arrest de judgment que le acc' ne gist. Et judgment stay, et ore fuit move arrere pur judgment. Et diversity pris inter torts et contracts des infants, car coment infants ne serront lie p' contracts unc' serront lie pur torts. Sed per cur: coment infants serront lie p' actual torts, come trespass, &c., queux sont vi et contra pacem unc' ne serront lie p' ceux q' sound in deceit, car si serront, touts les infants in Anglitterre serront ruine, et in cases lou lour contracts ne eux lie serront ch' come pur tort.*”

I am not aware what answer can be effectually made to those observations. 'The case of' *Clarke v. Cobley* (b), was clearly, I think, decided correctly; nor do I doubt that the decisions in *Watts v. Cresswell* and *Savage v. Foster* (c) were required by the peculiar circumstances of those cases. In the latter case, Mr. and Mrs. Foster might have barred their title by a fine, and it was, I suppose, considered, that she did not commit a fraud under the husband's influence. In *Watts v. Cresswell* the minor must be supposed to be considered as not having acted under his father's control; and in each of the cases the conduct seems to have been of the most gross

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(a) 1 Siderfin, 258; S. C., 1 Lev.
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(b) Before cited.
(c) 3 Atk. 695.

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description; it was a grossly dishonest case; so gross as, perhaps, to have been obnoxious to criminal proceedings. Lord *Cowper* says, in *Watts v. Cresswell*, "If he was made a party to the deed, and sealed it, yet that would not bind him." And here, perhaps, it may not be quite out of place to remember Lord *Hardwicke's* remarks on the difference between the disability of infants and married women, which he made in *Hearle v. Greenbank*, and also in the case of *Esron v. Nicholas (a)*. With respect to the latter case, I may, perhaps, be allowed to say, that the report in the 2nd Equity Cases Abridged does not appear satisfactory. I venture to think that that case, as there stated, affords no sufficient foundation for the decree that was made; and I may possibly be permitted to say the same of the case, as it appears in the Registrar's Book, which, however, does not give the pleadings, nor shew what the evidence was; nor, probably, without an examination of the proofs and pleadings, is it possible to form a just opinion of Lord *King's* decree, which gave no costs. I collect that the lease there was made three or four years before the defendant's majority; and that his age had not been misrepresented to the plaintiff, but was known from the beginning. Perhaps it might have been true that the defendant had fraudulently represented himself to the plaintiff as able to grant the lease, or that the defendant, at or after his majority, had received a fine, or its value.

Upon the decision in *Cory v. Gertcken (a)*, and the dictum in *Overton v. Banister (a)*, by two judges of great weight and consideration, I do not think it necessary to express, and I do not intimate any opinion. Each of them is distinguishable from the present case. By neither of them, nor by the case of *Ex parte Watson (b)*, is it, as I conceive, rendered incumbent on me to give to the present plaintiffs their decree against J. K. Dawson. The case last mentioned is a case in bankruptcy, to which reference was

(a) Before cited.

(b) 16 Ves. 265.

particularly made in *Belton v. Hodges* (a), which occurred more than twenty years after in the Common Pleas. The case in bankruptcy as reported by Vesey (b), is “ex relatione,” but is, I think, not inaccurate. I have read the original affidavits on which the petition was heard. By declining to supersede the commission, Lord *Eldon* did not prevent the petitioner from disputing its validity at law, nor does there appear reason to suppose that Lord *Eldon* was asked, or would have consented, to interfere against the petitioner for the purpose of enforcing against him submission to the bankruptcy.

Goode v. Harrison (c) may be thought a remarkable case; but, if it do not oppose, I am not sure it does not support, the plaintiffs’ contention against the younger Dawson. If that action had been by an unpaid vendor for goods supplied in 1818, during Bennion’s minority, and not by a vendor of goods sold more than six months after he attained his majority, (the case being, in all other respects, as I stated, in fact), could there have been judgment against Bennion at law? And if there could not, would there have been any title to relief against him in equity? In my opinion, I repeat, the notion of charging a man in equity after his majority, on a purchase or sale, or contract made during his minority, merely because, without any false assertion, by him, the other party believes he is not a minor, and believes it on the ground that adults themselves can only have such dealings, is contrary to principle, and is of dangerous consequence, and is not established by authority. There may be, indeed, a want of delicacy or propriety in the conduct of a young man of twenty buying a picture or a statue on credit, without mentioning his age; but that can only be on the notion that such conduct is not prohibited by the laws. Laws cannot vindicate every deflexion from propriety; and it must be preferable that men of full age, in or out of

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(a) 9 Bing. 365. (b) 16 Ves. 265. (c) 5 B. & Ald. 147.

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trade, should sometimes suffer for acts of imprudence, than that there should be given an obvious facility and plain encouragement to minors to be their own destroyers, and to others to make them their prey, which would be afforded by the rule, that mutual silence, with an appearance of manhood, should expose a boy, on the ground of fraud, to be fixed after his majority with the consequence of the most ruinous, most rash, and foolish contracts, or with the liability to restore money wasted in childish extravagance.

In the cause now before the Court, J. K. Dawson's legal title is sought to be taken from him, on the ground of a sale during his infancy, in respect of which he has not received nor is to receive the purchase-money. There seems reason to believe that the purchase-money went into the hands of Middleton & Barber towards satisfying a pecuniary demand of greater amount which they alleged to have against him, but, in respect of which, it is possible, if not certain, that he could not have been sued; and any relief against Middleton & Barber cannot be given in this suit, constituted as it is. Their right was, and is, to be dismissed from it.

Upon the whole, if it be assumed that, from the beginning to the end of the year 1842, the plaintiffs and Mr. Hoole and Ewart & Bell believed that J. K. Dawson was of full age, (and there is no reason to suspect the contrary), the case is still not one in which, either on principle or on authority, but independently of either, the Court ought, in my opinion, to pronounce that fraud has been committed by him, in respect of which relief in equity should be given against him. It follows, that I must think it unnecessary, for the purposes of the question of relief, to decide whether the father has any lien on the shares, or any interest in them. Without determining that point, I conceive the bill ought to be dismissed against the Dawsons, with costs, as to the father; without costs as to the son; and without prejudice to any action or any other suit.

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BEFORE THE VICE-CHANCELLOR OF ENGLAND.

TAWNEY v. THE LYNN AND ELY RAILWAY COMPANY. *March 20th.*

THIS was a motion by the owner of land at Littleport, in the Isle of Ely, for an injunction (in the terms of the prayer of a bill filed by him for this purpose) to restrain the Lynn and Ely Railway Company from entering upon certain pieces of land, referred to in the deposited plans by the numbers 118, 120, 122, and 125, in pursuance of a notice of the 24th of December, 1846, served on the plaintiff on behalf of the defendants, and also from entering upon any part of the said pieces of land under the powers of the Lynn and Ely Railway Company's Act, and the Lands Clauses Consolidation Act, except for the purposes of survey, &c., until they should have paid to the plaintiff or deposited in the bank in the manner mentioned in the Lands Clauses Consolidation Act, the purchase-money or compensation, which should, according to the provisions of the said acts, be duly and properly agreed or awarded to be paid to the plaintiff for his interest in such part of the said pieces of land.

The facts of the case were as follow:—The Lynn and Ely Railway Company having obtained their act (8 & 9 Vict. c. 55), with which the Lands Clauses Consolidation Act was incorporated, on the 17th of March, 1846, served the plaintiff with a notice of their intention to take a portion of the pieces of land, numbered 118 and 120, but such notice not being in accordance with the provisions of the last-mentioned act, was treated by both parties as

A Railway Company gave notice to a landowner, that they intended to take a certain portion of his land under the powers of their act, for the purposes of their railway, which notice they alleged, and on the pleadings it was admitted to be invalid. The Company subsequently gave a second notice, that they should require twenty perches of land, but before anything was done on either side, they gave a notice of withdrawal of their second notice, and then served a third notice on the plaintiff, whereby they stated that they required one perch only of the plaintiff's land. The plaintiff filed a bill, and moved for an injunction to restrain the Company from proceed-

ing on the last notice:—*Held*, that the withdrawal of the second notice by the Company not having been assented to by the plaintiff, that notice constituted a binding contract on the Company, and the last notice must be treated as a nullity.

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informal and invalid, and in consequence thereof the defendants, on the 16th of December, served another notice on the plaintiff, informing him that they intended to purchase, take, and use, for the purpose of their railway, amongst other portions of land therein referred to, about 20 perches of the piece of land numbered 122, and requiring the plaintiff to deliver, on or before the expiration of one calendar month from the service of the notice, a statement of the particulars of his estate and interest, and of his claims in respect thereof, and stating that the Company were ready to treat for the purchase of such interest, and for the amount of compensation to be paid to the plaintiff.

Before any further proceedings were had under the last notice, the engineer of the Company ascertained that only one perch of the piece of land numbered 122 would be required for the purposes of the railway, and consequently, on the 29th of December, another notice, dated the 24th December, was served on the plaintiff, in all other respects corresponding with the notice of the 16th December, except that the quantity of land required out of the piece numbered 122 was stated to be one perch, instead of 20 perches, as in former notice. At the same time with the notice of the 24th December, notice of the withdrawal of the former notices was served on the plaintiff by the Railway Company. The plaintiff having protested against the validity of the last notice, and having refused to take any steps to comply therewith, the Company, on the 25th of February, gave him notice that they intended to apply, under the 85th section of the Lands Clauses Consolidation Act (*a*), to two justices, to appoint

(*a*) Sect. 85 : " Provided also, that if the promoters of the undertaking shall be desirous of entering upon and using any such lands before an agreement shall

have been come to, or an award made, or verdict given, for the purchase-money or compensation to be paid by them in respect of such lands, it shall be lawful for

veyor to determine the value of the lands, in order the amount might be deposited, and that the Com-might be enabled to enter. The plaintiff thereupon his bill in equity, and the present application was

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The portion of the land in question required by company was valued at £50.

Bethell and Mr. *E. F. Smith*, in support of the

motors of the undertaking sit in the bank, by way rity as hereinafter men- either the amount of se-money or compensation l by any party interested ntitled to sell and convey nds, and who shall not to such entry, or such a shall by a surveyor ap- by two justices, in man- einbefore provided in the parties who cannot be be determined to be the of such lands or of the ; therein which such party led to, or enabled to sell urvey, and also to give to arty a bond under the n seal of the promoters, if a corporation, or if they a corporation under the and seals of the said pro- or any two of them, with fficient sureties, to be ap- of by two justices, in case ties differ, in a penal sum to the sum so to be de- , conditioned for payment a party, or for deposit in ik, for the benefit of the interested in such lands, case may require under

the provisions herein contained, of all such purchase-money or compensation as may in manner hereinbefore provided be deter- mined to be payable by the pro- moters of the undertaking in respect of the lands so entered upon, together with interest thereon at the rate of 5l. per cent. per annum, from the time of entering on such lands until such purchase-money or com- pensation shall be paid to such party, or deposited in the bank for the benefit of the parties in- terested in such lands, under the provisions herein contained, and upon such deposit, by way of security, being made as aforesaid, and such bond being delivered or tendered to such non-consenting party as aforesaid, it shall be lawful for the promoters of the undertaking to enter upon and use such lands, without having first paid or deposited the pur- chase-money or compensation in other cases required to be paid or deposited by them before en- tering upon any lands to be taken by them under the provisions of this or the special act."

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motion.—The Company once having given notice of their intention to take a certain piece of land, created a contract with the assistance of the act, from which neither party could depart without the consent of the other. The second notice, not being in itself invalid, remained good as against the Company, although no assent or dissent had been expressed by the plaintiff, and the Company remained bound by such notice: *Stone v. The Commercial Railway Company* (a), *Rex v. The Hungerford Market Company* (b). That, supposing the third notice to be valid, the Railway Company had no right to proceed in the manner they had threatened by their notice, inasmuch as the Company, in the event of an owner not claiming under the 85th section, had no right, where the party could be found, to proceed under the alternative of that section. That that alternative was only given where by the absence of parties the Railway Company were precluded from proceeding. The 21st section of the Lands Clauses Consolidation Act provides for the case of no claim, or an excessive claim, being made by the landowner.

Mr. *Stuart* and Mr. *Malins*, *contrà*.—The second notice was never acted upon, and was not in any manner acknowledged or assented to by the plaintiff, and until such acknowledgment or assent, no contract is entered into, nor are the relative positions of vendor and purchaser constituted. There is nothing in the Lands Clauses Consolidation Act which renders a mere notice an absolute contract binding on the Company. *Stone v. The Commercial Railway Company* was decided before the passing of the Lands Clauses Consolidation Act, and cannot be received as an authority. At all events, the notice of withdrawal of the second notice, which was not objected to by the plaintiff, annulled that notice, and gave the Company an opportunity of com-

(a) *Antè*, Vol. 1, 375. (b) 1 Per. & D. 492; S. C., 9 Ad. & E. 463.

mencing *de novo*. The alternative in the 85th section is clearly applicable to the present case. The words "in the manner provided in the case of parties who cannot be found," are only descriptive of the process alluded to, and are intended to save the repetition of the words in the 59th section (*a*). The power of getting an appointment of a surveyor by two justices was intended to give a complete remedy to the Company against the obstinacy of persons who refused to make a claim, and to relieve them in the case of an excessive claim being made. The Court will not permit litigious persons who have no real interest, or so small an interest as the present plaintiff, at stake, to stop the proceedings of a Company to whom the Legislature has given the power of performing works which, by the words of the act, are acknowledged to be "of great public advantage."

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The VICE-CHANCELLOR.—In the case of *Webb v. The Manchester and Leeds Railway Company* (*b*), on an application for an injunction, the Lord Chancellor did not entertain the question of value at all, but the sole question was, whether the Railway Company were proceeding in a lawful manner, according to their act. The question before me is not, whether, in point of value, the matter is worthy of consideration—it may be insignificant—but whether the Company, who had only a right to take land under the provisions of their act, have complied with such provisions. If the Court do not require Companies in taking land to keep strictly within the powers given them by the Legislature, these acts may be converted into the means of the severest tyranny. Individuals are now disabled from dealing with their own property, and they are entitled to such protection as this Court can afford, without compelling

(*a*) See 59th section, post, p. 624.

(*b*) Antè, Vol. 1, 576.

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them to resort to law. It is the duty, then, of the Court to see whether what the Company proposes to do is justified by their act. I do not think it necessary to decide this case on the words of the 85th section, but I decide it on these clear grounds. The first notice was given, but, as I understand it, was disregarded by both parties, and is admitted to be invalid. The second notice was given on the 16th of December, but had not been acted upon, and nothing was done by either party under it before the third notice, of the 24th of December, was given. In the third notice of the 24th of December there is a substantial variation from the second notice, and the Company take upon themselves to recall the former notice, and to substitute the third in its place. I am of opinion that the Company have no power to do this, except with the concurrence of the other party. If the notice when given were allowed to be recalled and varied at the pleasure of companies, they might continually plague and perplex proprietors with new notices, so that it would be impossible for them to know how to deal with the remainder of their land. I do not think that, under the true construction of these acts, companies have the power to do this; and my opinion is, that the first valid notice is the one which is binding upon the parties.

The order, as drawn up by the Registrar, was as follows:—

[That an injunction be awarded to restrain the defendants, the Lynn and Ely Railway Company, their servants, &c., from taking any proceedings to ascertain the value of, and from entering upon any part of certain pieces or parcels of land, situate in the parish of Littleport, in the Isle of Ely, and county of Cambridge, mentioned and referred to by the numbers 118, 120, 122, and 125, in the plaintiff's

bill, and in the plans deposited with the clerks of the peace of the counties of Norfolk and Cambridge, as stated in the Lynn and Ely Railway Act, 1845, under, or by virtue, or in pursuance of a notice, bearing date the 24th day of December, 1846, served on the said plaintiff on behalf of the said defendants, and in the said bill particularly mentioned; and also from entering upon any part of the said pieces or parcels of land, under the powers of the Lynn and Ely Railway Act, 1845, and the Lands Clauses Consolidation Act, 1845, except for the purpose of surveying and taking levels of the said pieces or parcels of land, and of probing or boring to ascertain the nature of the soil, and of setting out the line of the works, under the provisions of the said acts, until they shall have paid to the said plaintiff, or deposited in the bank, in the manner mentioned in the Lands Clauses Consolidation Act, 1845, the purchase-money or compensation which shall, according to the provisions of the said acts, be duly and properly agreed or awarded to be paid to the said plaintiff, for his interest in such part of the said pieces or parcels of land; and until the said defendants shall fully answer the plaintiff's bill, or this Court make other order to the contrary; but this order is to be without prejudice to such right, if any, as the defendants may have to proceed by virtue of the notice of the 16th day of December, 1846.]

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them to resort to law. It is the duty, then, of the Court to see whether what the Company proposes to do is justified by their act. I do not think it necessary to decide this case on the words of the 85th section, but I decide it on these clear grounds. The first notice was given, but, as I understand it, was disregarded by both parties, and is admitted to be invalid. The second notice was given on the 16th of December, but had not been acted upon, and nothing was done by either party under it before the third notice, of the 24th of December, was given. In the third notice of the 24th of December there is a substantial variation from the second notice, and the Company take upon themselves to recall the former notice, and to substitute the third in its place. I am of opinion that the Company have no power to do this, except with the concurrence of the other party. If the notice when given were allowed to be recalled and varied at the pleasure of companies, they might continually plague and perplex proprietors with new notices, so that it would be impossible for them to know how to deal with the remainder of their land. I do not think that, under the true construction of these acts, companies have the power to do this; and my opinion is, that the first valid notice is the one which is binding upon the parties.

The order, as drawn up by the Registrar, was as follows:

That injunction be awarded to restrain the defendant and Ely Railway Company, their servants, from any proceedings to ascertain the value of, or to enter upon any part of certain pieces or parcels of land in the parish of Littleport, in the Isle of Ely, the bridge, mentioned and referred to in Nos. 120, 122, and 125, in the plaintiff's

bill, and in the plans deposited with the clerks of the peace of the counties of Norfolk and Cambridge, as stated in the Lynn and Ely Railway Act, 1845, under, or by virtue, or in pursuance of a notice, bearing date the 24th day of December, 1846, served on the said plaintiff on behalf of the said defendants, and in the said bill particularly mentioned; and also from entering upon any part of the said pieces or parcels of land, under the powers of the Lynn and Ely Railway Act, 1845, and the Lands Clauses Consolidation Act, 1845, except for the purpose of surveying and taking levels of the said pieces or parcels of land, and of probing or boring to ascertain the nature of the soil, and of setting out the line of the works, under the provisions of the said acts, until they shall have paid to the said plaintiff, or deposited in the bank, in the manner mentioned in the Lands Clauses Consolidation Act, 1845, the purchase-money or compensation which shall, according to the provisions of the said acts, be duly and properly agreed or awarded to be paid to the said plaintiff, for his interest in such part of the said pieces or parcels of land; and until the said defendants shall fully answer the plaintiff's bill, or this Court make other order to the contrary; but this order is to be without prejudice to such right, if any, as the defendants may have to proceed by virtue of the notice of the 16th day of December, 1846,]

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BEFORE THE LORD CHANCELLOR.

April 23rd.

BRIDGES v. The WILTS, SOMERSET, AND WEYMOUTH RAILWAY COMPANY.

A railway company, without agreeing for the purchase of certain lands scheduled in their act, and without notice to the owners, under the 85th section of the Lands Clauses Consolidation Act, deposited the value in the Bank, and delivered a bond, and were about to enter on the lands when the owners filed a bill and applied for an injunction:—*Held*, on appeal, affirming the decision of the Vice-Chancellor of England, that the Company were right in their proceedings, and no injury being alleged, the application was refused with costs.

THE bill in this case was filed by B. and S. Bridges, trustees under a will of certain lands, which the Wilts, Somerset, and Weymouth Railway Company were authorised to take under the powers of their act, for the purposes of their railway, and after stating various negotiations for the purchase of the land by agreement, which however failed, and that no terms were finally settled between the parties; and further stating, that the Company were proceeding to enter upon their lands under the 85th sect. of the Lands Clauses Consolidation Act, and without having complied with the requisitions of that act, prayed an injunction to restrain the Company from entering upon such lands until they had fully complied with the requisitions of the act of Parliament.

It appeared that the Railway Company finding they could not obtain the land they required by agreement, had, without notice to the plaintiffs, obtained the appointment of a surveyor by two justices, delivered a bond under the seal of the Company with two sureties, and deposited in the Bank in the usual form the sum estimated by such surveyor to be the value of the land.

An application was made to his Honor the Vice-Chancellor of England on the 30th of March for an injunction in the terms of the prayer of the bill, but his Honor refused the application with costs, &c.

It now came on by way of appeal.

Mr. *J. Parker* and Mr. *Torriano* in support of the motion.

—It can hardly be contended that all the requisitions of the 85th section have been complied with. That section contemplates that a bond, with two sufficient sureties, to be approved of by two justices, in case the parties differ, shall in every case be given,—how can these words be applicable to a case in which all the proceedings are *ex parte*, and no notice whatever is given to one of the parties? A possibility of differing implies an opportunity of treating. The scope of the act is, that, in cases where the parties are either absent from the country, or incompetent or unwilling to treat, the Company shall be enabled to proceed under the 85th section without notice; but neither of those events having happened in this case, that part of the act does not apply, and notice must be given by the Company at every step of their proceedings. The 59th section bears out this view of the case; for where notice is not intended to be given it is so expressly stated in the act.

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The LORD-CHANCELLOR: [without hearing Mr. *Bethell* and Mr. *Osborne*, who appeared for the Company.]—This appears to me to be a clear case. I can only consider the act as I find it. I find certain cases where notice is to be served on the opposite party; then I come to the 85th section, which not only does not require, but directs &c. (His Lordship read the material part of the section). Now, turning to the 59th section, which is the section referred to in the 85th section, I find a provision in reference to which notice cannot be required. The question, then, being whether notice is required or not by the 85th section, and finding that where notice is required the act so expresses it, and there being also a reference to a proceeding where no notice is required, it is evident there can be no notice necessary in the present case. The reference to the 59th section makes this clear. No doubt there is a difficulty as to the bond, because

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there are sureties. I cannot, however, separate the two cases. The sureties are to be approved of by two justices if the parties differ. If the parties had differed the jurisdiction of the justices would have arisen; but all that is said is that there was no opportunity for raising the discussion. Parties applying for an injunction must shew some injury. In the situation in which the plaintiff was placed he had no cause for differing, neither does he now allege any. The provisions of the act have been complied with, and the Company are entitled to take possession of the land (a).

(a) The 85th section of the Lands Clauses Consolidation Act is set out *antè*, p. 616. The 59th section is as follows:—

The 59th sect. referred to by the 85th is as follows:

“Upon application by the promoters of the undertaking to two justices, and upon such proof as shall be satisfactory to them that any such party is by reason of absence from the kingdom, prevented from treating, or cannot after diligent inquiry be found, or

that any such party failed to appear on such inquiry before a jury as aforesaid after due notice to him for that purpose, such justices shall, by writing under their hands, nominate an able practical surveyor for determining such compensation as aforesaid, and such surveyor shall determine the sum accordingly, and shall annex to his valuation a declaration in writing subscribed by him of the correctness thereof.”

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BEFORE THE VICE-CHANCELLOR OF ENGLAND.

SIMPSON and Another *v.* The LANCASTER AND CARLISLE
RAILWAY COMPANY.

April 29th,
May 4th.

THE bill filed on the 16th of April, 1847, stated, among other things, that the plaintiff, E. Simpson, was tenant for life of certain lands, (the subject of the suit), with remainder to the plaintiff, William Hodgson, in fee. That an act was passed, (7 Vict. c. cxxxvii), whereby the defendants were incorporated, and had power to take certain lands scheduled in their act for the purposes thereof; and by the said act, (sect. 247,) it was enacted, that the land to be taken for the line of the railway should not exceed the breadth of twenty-two yards, without the consent of the owners, except in the following cases, viz. except at or near the termination of the railway, except on commons, downs, moors, or uninclosed or waste grounds, and except when a greater breadth should be required for the following purposes, that is to say, for additional lines of rails for carriages to wait, load, or unload, and to turn or pass each other, for raising embankments or viaducts, or for cuttings, or for the slopes of such embankments or cuttings, for the erection and establishment of any fixed or permanent machinery, toll-houses, warehouses, depôts, stations, wharves, erections, buildings, and other works necessary for the formation, maintenance,

A railway company were empowered by their first act to take compulsorily certain lands for the purposes of their act, but were limited to twenty-two yards in width, except for purposes therein specified. The Company agreed with the plaintiffs for a certain portion of their lands, and the price was fixed by arbitration; they subsequently obtained two acts of Parliament, by one of which they were empowered to erect a station, and the powers of taking land given by the first act were extended to those acts,

which, however, did not contain any new schedules. The Company, who had already taken twenty-two yards for their railway, served notices on the plaintiffs slightly differing from each other, but sufficiently clear to identify the lands, and thereby required the rest of the plaintiffs' land comprised in the schedule to the first act, "under the authority of that and their two subsequent acts, or one of them;" but such notices did not state the purposes for which the land was required.

The plaintiffs filed a bill and applied for an injunction to restrain the Company from taking any further portion of their land:—*Held*, that the Company had not, by taking the land for their railway, exhausted the powers of the first act, so as to preclude them from taking more land for their station, and it being shewn by affidavit that the land was required for a station, plaintiffs' application refused with costs.

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provisions of their first act, had, by their contract and agreement with the plaintiffs, exhausted all their power under that act. That, if they had any existing right, it was only under the first act, and that the notice being given under "the first, second, and third acts, or one of them, it would not apply to the first and third acts together. That, the purpose for which the land was required was not stated on the notice, and was, in fact, for the purposes of the third act, by which act the Company had no power to take the land in question.

That two notices had been given, in which the lands required were differently described, and that, however small the difference in the notices, they came within the principle laid down in *Tawney v. The Lynn and Ely Railway Company* (a).

Mr. *Bethell* and Mr. *Follett*, contra.—The powers of the Company are derived under their act of Parliament, and the Legislature has invested them with such powers, without any limitation, except such as are expressly imposed. Under the first of the Company's acts, they have the power within a certain time to take and use certain lands for certain purposes; but there is nothing either express or implied to shew that the Company are obliged, in treating with an individual, to exercise their power all at once, which would, in fact, if one taking were completed within two months, or any other limited time after the passing of the act, be putting a restriction on the exercise of the power within a certain time not limited by the act. The principle laid down by the Master of the Rolls and Lord Chancellor, in *Braynton v. The London and North Western Railway Company* (b), may be applied to this case, as also *Webb v. The Manchester and Leeds Railway Company* (c), *Dun Navigation Company v. The North Midland Railway Company* (d),

(a) *Antè*, p. 615.

(b) *Antè*, p. 101.

(c) 4 *Myl. & Cr.* 116.

(d) *Antè*, Vol. 1, p. 135.

to be paid by them to arbitration, and an award was made, dated the 22nd of November, 1845.

That no part of the purchase-money had been paid, nor had the lands been conveyed to the defendants.

That, in consequence of the Company having disclaimed any intention of taking or purchasing the barn, and after they had taken as much of the land as they required, and made a portion of their railway, the plaintiffs proceeded to alter the barn into dwelling-houses, and expended a considerable sum in such alterations.

That an act of Parliament was passed, 8 & 9 Vict. c. lxxxiii, intituled "An Act to enable the Lancaster and Carlisle Railway Company to alter the Line of their Railway, and to make a Branch therefrom, and for other Purposes relating thereto;" but that none of the provisions of the said act authorised or empowered the defendants to take any further part of the plaintiffs' lands.

That another act was passed, 9 & 10 Vict. c. cclvii, intituled "An Act to enable the Lancaster and Carlisle Railway to extend and enlarge their Station and extend their Railway at Carlisle, and for other Purposes," but that neither the last-mentioned act nor the plans deposited under the provisions of that act contained any reference to the plaintiffs' lands (*a*).

(*a*) It was provided by the 1st sect. of the said two acts, "that all the powers to take lands, and all other the powers, authorities, provisions, directions, penalties, forfeitures, payments, exemptions, remedies, regulations, clauses, matters, and things contained in the said recited acts, (except such of them or such parts thereof respectively as are repugnant to this act, or as are by this act expressly repealed, altered, or otherwise provided for), shall

extend and be construed to extend to this act, and shall operate and be in force in respect to the objects and purposes hereof, as fully and effectually to all intents and purposes whatever, as if the same powers, authorities, provisions, directions, penalties, forfeitures, payments, exemptions, remedies, regulations, clauses, matters and things were repealed and re-enacted in this act, provided that the powers of the Company for the compulsory

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That in November, 1846, one of the directors of the Company, on behalf of the Company, entered into a treaty with the plaintiffs for the purchase of the remainder of the pieces of land marked respectively 160 and 168 A, and also of the barn and pasture marked 168; but the board refused to purchase on the terms proposed, and on the 24th of December, 1846, the Company caused a notice, in the usual form, to be served on the plaintiffs, informing them that by virtue and under the authority of the first, the second, and the third mentioned acts, or one of such acts, the lands mentioned in the schedule thereunder written were required by the Company to be purchased and taken "for the purposes of the said acts, or of one of them."

The schedule referred to in the notice was as follows:—"All that piece of land delineated in the plan hereunto annexed, and therein coloured red, together with the buildings thereon erected, situate, &c., containing in the whole 5 acres, 1 rood, 22 perches of land, superficial measure, or thereabouts, and which premises are parcel of certain lands and hereditaments described in the plan and book of reference of the said railway, authorised by the said firstly-mentioned act, deposited with the Clerk of the Peace, &c., and therein numbered 160, in the said township of Upperby, and 168 and 168 A, in the said township of Botchergate."

The plan annexed to the last-mentioned notice set out the whole of the barn and pasture marked respectively 168 A and 160, except so much thereof as had been purchased by the Company, and contained a reference as follows:—"Coloured red, 160, 168, and 168 A. Quantity required, 5 acres, 1 rood, 22 perches."

That on the 15th of March the Company caused another notice to be served on the plaintiffs in the same form in

purchase or taking of land for the purpose of this Act shall not be exercised after the expiration of three years from the passing hereof."

r respects as the notice of the 24th of December, but schedule thereby referred to was as follows: "All that of land delineated in the plan hereunto annexed, and therein coloured red, together with the buildings thereon situated, situate &c., containing in the whole 26,347 square yards of land, superficial measure, or thereabouts; such premises are parcel of certain land and hereditaments described in the plan and book of reference of the railway, authorised by the said firstly-mentioned act, situate with the Clerk of the Peace for &c., and therein numbered 160, in the said township of Upperby, and numbered 168 and 168A, in the said township of Botchergate." The plan annexed to the said last-mentioned notice set out the whole of the said barn and pasture marked 168, the said two pieces of land marked respectively 168A and 160, "except so much thereof as had been purchased or taken by the said Railway Company," and the same contained the following reference, that is to say—"quantity measured, No. 168, 168A, and 160—26,347 square yards, A. 1R. 31P."

The bill further charged that the defendants alleged that they required the lands included in the notices for the purpose of making a station for the use of the Company, and alleged that they were entitled to take the same for the purpose under the compulsory powers of the first-mentioned act, and in particular under the provisions contained in the 247th section, although their powers had been exhausted as regarded the lands of plaintiffs, and although the said lands so proposed to be taken were, as to a main part thereof, upwards of 100 yards from the line of the railway.

The bill prayed that the defendants might be restrained by injunction from taking any proceedings for obtaining possession of the pieces of land numbered respectively 160 and 168A, and the barn and pasture marked 168, or any part thereof, under the provisions of the said three acts of

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Parliament relating to the said Company, or under the Lands Clauses Consolidation Act, or any of them, and that it might be declared that, under the circumstances, all the compulsory powers formerly vested in the Company, enabling the Company to take the lands and premises, were exhausted, and had already been carried into effect.

This was a motion for an injunction in the terms of the prayer of the bill.

The plaintiffs filed affidavits in support of the statements in their bill.

The defendants also filed affidavits, by which it was, amongst other things, deposed that the pieces of land described in the plan, and numbered 160, 168, and 168A, were required by the Company for the purpose of making a depôt or station connected with their railway, and for the purpose of erecting and constructing thereon certain houses, warehouses, offices, and other buildings, yards, stations, wharves, engines, machinery, and such other works and conveniences as should be necessary; and that the said pieces of land were required and were necessary for the purpose of the acts of Parliament relating to the defendants' railway.

It was stated in another of the affidavits filed by the defendants, that, in consequence of an intimation from the plaintiffs that they would not require the Company to purchase the barn and the small portion of land severed to the west of the line of railway, it was arranged, prior to the arbitration under which the parts of the plaintiffs' lands were first taken by the Company, that, in determining the amount of purchase and compensation money to be paid to the plaintiffs, the value of the barn and plot of severed land should be excluded from the consideration of the arbitrators, as not intended to be comprised in the purchase, but that no other disclaimer was ever made by the said Company of any intention of taking or purchasing the barn. That the defendants were, and always had been, ready and

will be unnecessary at present to proceed with the title to the part already valued."

That, the notice dated the 18th of December, 1846, was, as the deponent believed, served on the plaintiff, William Hodgson, alone, and inasmuch as he disputed the right of the Company to purchase the land referred to therein, and refused to treat with the Company for the sale thereof, the opinion of counsel was taken as to the powers of the Company, and the sufficiency of such notice, and the Company were advised to serve another notice, in consequence of the omission to serve the plaintiff, Simpson, with the first notice, and that the notice of the 18th March, 1847, had been served accordingly. That the barn and pasture 168 were comprised in each notice, and that the land comprised in the schedule to both notices was the same land, and the plans attached to each notice were intended to delineate and describe the same land, and the boundaries and fences delineated on each plan were the same; but that the difference in quantity might have arisen from a more accurate admeasurement of the land having been made prior to the service of the second notice. That such a trifling difference of admeasurement might easily have arisen from a different mode of measuring the fences and other boundaries of land, and especially in such a case as the present, where one of such boundaries was a river.

Mr. Rolt and Mr. Bagshawe, in support of the motion, made the following points:—That the Company having power to take the land mentioned in their notice under the

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provisions of their first act, had, by their contract and agreement with the plaintiffs, exhausted all their power under that act. That, if they had any existing right, it was only under the first act, and that the notice being given under “the first, second, and third acts, or one of them, it would not apply to the first and third acts together. That, the purpose for which the land was required was not stated on the notice, and was, in fact, for the purposes of the third act, by which act the Company had no power to take the land in question.

That two notices had been given, in which the lands required were differently described, and that, however small the difference in the notices, they came within the principle laid down in *Tawney v. The Lynn and Ely Railway Company* (a).

Mr. *Bethell* and Mr. *Follett*, contra.—The powers of the Company are derived under their act of Parliament, and the Legislature has invested them with such powers, without any limitation, except such as are expressly imposed. Under the first of the Company’s acts, they have the power within a certain time to take and use certain lands for certain purposes; but there is nothing either express or implied to shew that the Company are obliged, in treating with an individual, to exercise their power all at once, which would, in fact, if one taking were completed within two months, or any other limited time after the passing of the act, be putting a restriction on the exercise of the power within a certain time not limited by the act. The principle laid down by the Master of the Rolls and Lord Chancellor, in *Braynton v. The London and North Western Railway Company* (b), may be applied to this case, as also *Webb v. The Manchester and Leeds Railway Company* (c), *Dun Navigation Company v. The North Midland Railway Company* (d),

(a) *Antè*, p. 615.

(b) *Antè*, p. 101.

(c) 4 *Myl. & Cr.* 116.

(d) *Antè*, Vol. 1, p. 135.

to be paid by them to arbitration, and an award was made, dated the 22nd of November, 1845.

That no part of the purchase-money had been paid, nor had the lands been conveyed to the defendants.

That, in consequence of the Company having disclaimed any intention of taking or purchasing the barn, and after they had taken as much of the land as they required, and made a portion of their railway, the plaintiffs proceeded to alter the barn into dwelling-houses, and expended a considerable sum in such alterations.

That an act of Parliament was passed, 8 & 9 Vict. c. lxxxiii, intituled "An Act to enable the Lancaster and Carlisle Railway Company to alter the Line of their Railway, and to make a Branch therefrom, and for other Purposes relating thereto;" but that none of the provisions of the said act authorised or empowered the defendants to take any further part of the plaintiffs' lands.

That another act was passed, 9 & 10 Vict. c. cclvii, intituled "An Act to enable the Lancaster and Carlisle Railway to extend and enlarge their Station and extend their Railway at Carlisle, and for other Purposes," but that neither the last-mentioned act nor the plans deposited under the provisions of that act contained any reference to the plaintiffs' lands (*a*).

(*a*) It was provided by the 1st sect. of the said two acts, "that all the powers to take lands, and all other the powers, authorities, provisions, directions, penalties, forfeitures, payments, exemptions, remedies, regulations, clauses, matters, and things contained in the said recited acts, (except such of them or such parts thereof respectively as are repugnant to this act, or as are by this act expressly repealed, altered, or otherwise provided for), shall

extend and be construed to extend to this act, and shall operate and be in force in respect to the objects and purposes hereof, as fully and effectually to all intents and purposes whatever, as if the same powers, authorities, provisions, directions, penalties, forfeitures, payments, exemptions, remedies, regulations, clauses, matters and things were repealed and re-enacted in this act, provided that the powers of the Company for the compulsory

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That in November, 1846, one of the directors of the Company, on behalf of the Company, entered into a treaty with the plaintiffs for the purchase of the remainder of the pieces of land marked respectively 160 and 168 A, and also of the barn and pasture marked 168; but the board refused to purchase on the terms proposed, and on the 24th of December, 1846, the Company caused a notice, in the usual form, to be served on the plaintiffs, informing them that by virtue and under the authority of the first, the second, and the third mentioned acts, or one of such acts, the lands mentioned in the schedule thereunder written were required by the Company to be purchased and taken "for the purposes of the said acts, or of one of them."

The schedule referred to in the notice was as follows:—"All that piece of land delineated in the plan hereunto annexed, and therein coloured red, together with the buildings thereon erected, situate, &c., containing in the whole 5 acres, 1 rood, 22 perches of land, superficial measure, or thereabouts, and which premises are parcel of certain lands and hereditaments described in the plan and book of reference of the said railway, authorised by the said firstly-mentioned act, deposited with the Clerk of the Peace, &c., and therein numbered 160, in the said township of Upperby, and 168 and 168 A, in the said township of Botchergate."

The plan annexed to the last-mentioned notice set out the whole of the barn and pasture marked respectively 168 A and 160, except so much thereof as had been purchased by the Company. It contained a reference as follows:—"Coloured red, 168, and 168 A, and 160, required, 5 acres, 1 rood, 22 perches."

That on the
 notice to be

purchase
 purchase

other respects as the notice of the 24th of December, but the schedule thereby referred to was as follows: "All that piece of land delineated in the plan hereunto annexed, and therein coloured red, together with the buildings thereon erected, situate &c., containing in the whole 26,347 square yards of land, superficial measure, or thereabouts; and such premises are parcel of certain land and hereditaments described in the plan and book of reference of the said railway, authorised by the said firstly-mentioned act, deposited with the Clerk of the Peace for &c., and therein numbered 160, in the said township of Upperby, and numbered 168 and 168A, in the said township of Botchergate."

The plan annexed to the said last-mentioned notice set out the whole of the said barn and pasture marked 168, and the said two pieces of land marked respectively 168A and 160, "except so much thereof as had been purchased as aforesaid by the said Railway Company," and the same contained the following reference, that is to say—"quantity required, No. 168, 168A, and 160—26,347 square yards, or 5A. 1R. 31P."

The bill further charged that the defendants alleged that they required the lands included in the notices for the purpose of making a station for the use of the Company, and they alleged that they were entitled to take the same for that purpose under the compulsory powers of the first-mentioned act, and in particular under the provisions contained in the 247th section, although their powers had been fully exhausted as regarded the lands of plaintiffs, and although the said lands proposed to be taken were, as to a main part thereof, upwards of 100 yards from the line of the railway.

The bill further charged that the defendants alleged that they were entitled to take the same for that purpose under the compulsory powers of the first-mentioned act, and in particular under the provisions contained in the 247th section, although their powers had been fully exhausted as regarded the lands of plaintiffs, and although the said lands proposed to be taken were, as to a main part thereof, upwards of 100 yards from the line of the railway.

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Parliament relating to the said Company, or under the Lands Clauses Consolidation Act, or any of them, and that it might be declared that, under the circumstances, all the compulsory powers formerly vested in the Company, enabling the Company to take the lands and premises, were exhausted, and had already been carried into effect.

This was a motion for an injunction in the terms of the prayer of the bill.

The plaintiffs filed affidavits in support of the statements in their bill.

The defendants also filed affidavits, by which it was, amongst other things, deposed that the pieces of land described in the plan, and numbered 160, 168, and 168A, were required by the Company for the purpose of making a depôt or station connected with their railway, and for the purpose of erecting and constructing thereon certain houses, warehouses, offices, and other buildings, yards, stations, wharves, engines, machinery, and such other works and conveniences as should be necessary; and that the said pieces of land were required and were necessary for the purpose of the acts of Parliament relating to the defendants' railway.

It was stated in another of the affidavits filed by the defendants, that, in consequence of an intimation from the plaintiffs that they would not require the Company to purchase the barn and the small portion of land severed to the west of the line of railway, it was arranged, prior to the arbitration under which the parts of the plaintiffs' lands were first taken by the Company, that, in determining the amount of purchase and compensation money to be paid to the plaintiffs, the value of the barn and plot of severed land should be excluded from the consideration of the arbitrators, as not intended to be comprised in the purchase, but that no other disclaimer was ever made by the said Company of any intention of taking or purchasing the barn. That the defendants were, and always had been, ready and

willing to complete the purchase, and the delay in the completion thereof since July then last, had been caused by the default of the plaintiffs; and the last letter received by the defendants from the plaintiffs prior to filing their bill, was dated the 4th of December then last, and contained this paragraph:—"The Directors have intimated their intention of taking the whole field, and therefore it will be unnecessary at present to proceed with the title to the part already valued."

That, the notice dated the 18th of December, 1846, was, as deponent believed, served on the plaintiff, William Hodgson, alone, and inasmuch as he disputed the right of the Company to purchase the land referred to therein, and refused to treat with the Company for the sale thereof, the opinion of counsel was taken as to the powers of the Company, and the sufficiency of such notice, and the Company were advised to serve another notice, in consequence of the omission to serve the plaintiff, Simpson, with the first notice, and that the notice of the 18th March, 1847, had been served accordingly. That the barn and pasture 168 were comprised in each notice, and that the land comprised in the schedule to both notices was the same land, and the plans attached to each notice were intended to delineate and describe the same land, and the boundaries and fences delineated on each plan were the same; but that the difference in quantity might have arisen from a more accurate admeasurement of the land having been made prior to the service of the second notice. That such a trifling difference of admeasurement might easily have arisen from a different mode of measuring the fences and other boundaries of land, and especially in such a case as the present, where one of such boundaries was a river.

Mr. *Rolt* and Mr. *Bagshawe*, in support of the motion, made the following points:—That the Company having power to take the land mentioned in their notice under the

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Parliament relating to the said Company, or under the Lands Clauses Consolidation Act, or any of them, and that it might be declared that, under the circumstances, all the compulsory powers formerly vested in the Company, enabling the Company to take the lands and premises, were exhausted, and had already been carried into effect.

This was a motion for an injunction in the terms of the prayer of the bill.

The plaintiffs filed affidavits in support of the statements in their bill.

The defendants also filed affidavits, by which it was, amongst other things, deposed that the pieces of land described in the plan, and numbered 160, 168, and 168A, were required by the Company for the purpose of making a depôt or station connected with their railway, and for the purpose of erecting and constructing thereon certain houses, warehouses, offices, and other buildings, yards, stations, wharves, engines, machinery, and such other works and conveniences as should be necessary; and that the said pieces of land were required and were necessary for the purpose of the acts of Parliament relating to the defendants' railway.

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for increasing the number of the directors of the Company by election, if so thought fit, of six new directors in addition to the existing directors of the Company; and if so thought fit, of proceeding at such meeting to elect such new directors accordingly; and in case of such election, of determining the order of rotation in which such directors should go out of office, and what number should be a quorum at meetings of directors of the Company, and also for the purpose of considering the provisions of a bill intitled "A proposed Bill for uniting the Birmingham and Oxford Junction Railway and the Birmingham, Wolverhampton and Dudley Railway Company into one Company, and for authorising the sale of the Birmingham, Wolverhampton and Dudley Railway and other new works to the Great Western Railway Company," and for the purpose of considering and determining the propriety of introducing into Parliament, or of proceeding with or withdrawing the said bill, and passing resolutions and giving directions touching any sale of the Birmingham and Oxford Junction Railway.

At this extraordinary meeting, by resolutions duly passed, the number of the directors was increased from 12 to 18, and the meeting was then adjourned until 5 o'clock of the same day. The adjourned ordinary meeting was duly held at the hour appointed, and it was then moved that one-third of the directors who were in office previous to the 27th of February, 1847, should retire from office, pursuant to the provisions of the general act and of the special act, and that the twelve directors should agree or determine among themselves which of them should retire. The chairman refused to put the motion, but after being duly moved and seconded, it was carried, almost unanimously, by the shareholders present, except the twelve directors, such shareholders exceeding 70 in number, and representing personally and by proxy upwards of 35,000 of the 50,000 shares of which the capital of the Birmingham and Oxford Junction Railway Company consisted. The twelve directors, however,

refused to ballot or to agree as to which of their body should retire from office.

The adjourned extraordinary meeting was afterwards duly held, and the Company passed some resolutions as to the order of rotation and the retiring of the re-elected and additional directors, and a resolution was also passed, to the effect—That the proprietors of shares, wholly disapproving of the proposed amalgamation with the Birmingham, Wolverhampton and Dudley line, and the proposed sale of the lines so amalgamated to the Great Western Railway Company, and not considering themselves legally or equitably bound by the proceedings of the directors, the directors should be instructed not to proceed further with, but to withdraw the proposed bill before Parliament; and that the directors should be further instructed forthwith to affix the Company's seal to a petition (which was then read) against the bill, and to cause such petition to be presented to the House of Commons, and to oppose such bill in committee; and the directors were instructed to oppose any proceedings towards the proposed amalgamation or sale without the further instructions of the shareholders.

The chairman having refused to affix the common seal of the Company to the petition, it was then resolved that Sir H. V. and any five other shareholders should be authorised to sign the same on behalf of the meeting, and that the directors should be instructed to take measures for adopting and carrying into effect the proposals then lately made to them by the North Western Railway Company, having for their object the joint use of that line by the Great Western and North Western Railway Companies, either upon the terms proposed or some equally satisfactory basis of arrangement, and that failing, that the line proposed should be completed forthwith and kept independent of either Company.

The bill alleged, that, in accordance with the Companies Clauses Consolidation Act, four of the twelve directors ought, at the adjourned ordinary meeting on the 13th of March, to

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have retired from the direction, and, in conformity with the provisions of the special act, four others ought to have been elected in their places by the shareholders then present or by proxy, but by reason of the refusal of the defendants the twelve directors, to determine by ballot among themselves, or otherwise agree as to the individuals to retire, the shareholders present at such ordinary meeting could not elect the persons to supply the places of the retiring directors, and that it was impossible to ascertain which of the directors ought to have retired from office, by reason whereof the twelve original directors were incompetent to act as directors, and that the six new directors were the only competent directors of the Company.

The bill charged that the defendants, the twelve directors, had possession of the common seal, and the minute books, &c. of the Company, and had under their control large sums of money, amounting to upwards of £100,000, belonging to the Company, to which further sums would shortly be added; that they had brought the bill (before mentioned) into Parliament, and had not only refused to set the common seal of the Company to the petition, but threatened and intended to prosecute the bill in Parliament, and to represent themselves as a majority of the lawful directors of the Birmingham and Oxford Company, and in that character to carry the bill through Parliament.

The bill prayed an injunction to restrain the twelve directors from voting or acting as directors of the Birmingham and Oxford Junction Railway Company, and that they might be ordered and decreed to place the common seal of the Company, and all the property and funds, books, &c. of the Company in their possession, custody, or power, under the control of the lawful directors of the Company, for the purposes of the Company, and that they might in the meanwhile be restrained from voting or acting as directors of the Birmingham and Oxford Junction Railway Company.

To this bill some of the defendants, and also the Company, put in general demurrers.

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Sir *F. Kelly*, Mr. *Stuart*, Mr. *Rolt*, and Mr. *G. L. Russell*, in support of the demurrer, cited *Foss v. Harbottle* (a), *Adley v. Whitstable Corporation* (b), *Preston v. Grand Collier Dock Company* (c), *The Mayor of Colchester v. Lowten* (d), *Attorney-General v. Wilson* (e), *Mayor of Thetford's case* (f), *Hichens v. Congreve* (g), *Ware v. Grand Junction Waterworks Company* (h), 6 Vin. Abr., "Corporation," 306.

Mr. *Bethell*, Mr. *J. Parker*, and Mr. *Willcock*, in support of the bill, cited the following cases: *Frewin v. Lewis* (i), *Proprietors of the River Dun Navigation Company v. The North Midland Railway* (k), *Attorney-General v. The Mayor of Liverpool* (l), *Attorney-General v. The Mayor of Norwich* (m), *Ward v. The Society of Attornies* (n), *Van Sandau v. Moore* (o), *Wallworth v. Holt* (p).

THE VICE-CHANCELLOR.—The first question in this case is, whether there has not been an improper omission of electing four persons to go out by ballot? Now, it really appears to me that the question turns on the true construction of the language which is to be found in the 13th clause, because, if the special act had allowed the matter to proceed according to the provisions of the Consolidation Act, there would have been no difficulty. Everybody seems to admit, that, this being the first time when there was to be any going out at all, there would be a going out of four, (being

(a) 2 Hare, 461.

(b) 17 Ves. 315; S. C., 1 Mer. 107.

(c) Antè, Vol. 2, 335.

(d) 1 Ves. & B. 226.

(e) 1 Cr. & Ph. 1.

(f) 3 Salk. 103.

(g) 4 Russ. 562.

(h) 2 Russ. & My. 470.

(i) 4 My. & Cr. 249.

(k) Antè, Vol. 1, 135.

(l) 1 My. & Cr. 171.

(m) 2 My. & Cr. 406.

(n) 1 Coll. 370.

(o) 1 Russ. 441.

(p) 4 My. & Cr. 619.

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one-third of the existing number, twelve), to be determined by ballot among themselves—that is, the twelve—unless they should otherwise agree who should go out of the office. Now the special act of Parliament, which, as I understand, is part of that larger thing which is compounded of the special act of Parliament and the Consolidation Act amongst others, is so constructed as that which is found in the Consolidation Act became part of the special act, so far as the same, that is, as the provisions of the Consolidation Act are not modified by or inconsistent with the provisions contained in the special act.

Now, what is provided by the special act is this. In the first place, certain persons were by the 10th and 11th clauses appointed directors; and then it is enacted by the 12th clause that the directors appointed by this act shall continue in office until the first ordinary meeting to be held after the passing of the act; and when you look to the 16th section, you find it is enacted that the first ordinary meeting of the Company shall be held within six months after the passing of this act; and then it is directed that at such meeting the shareholders present, personally or by proxy, may either continue in office the directors appointed in this act, or any number of them, or may elect a new body of directors. In point of fact, what they did was this, as I collect from the bill; they continued ten of the twelve, and elected two as a substitution for two others of the former directors, so that there was a partial continuance and a partial election. And then the 13th section says: “And be it enacted, that, at the first ordinary meeting to be held in the year next after the year in which such last-mentioned directors shall have been appointed or elected, the shareholders present personally or by proxy shall elect persons to supply the places of directors then retiring from office agreeably to the provisions in the Companies Clauses Consolidation Act contained. Now, in this respect, as I understand it, there is a variance intro-

duced so as to make the course of proceeding different from that which would have taken place provided there had not been this special enactment in this special act; and it appears to me that you must construe this act according to the language in which you find it couched. (His Honor then referred to the principles of construction laid down by Lord *Cottenham* in *The Attorney-General v. Malkin*(a), and again proceeded).

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Now, in substituting the words which relate to the act of Parliament by the Legislature for those words which my Lord Chancellor has applied with respect to the testator, I find it to be, in effect, the opinion of the Lord Chancellor, that I am bound to construe these words according to their ordinary meaning? What is the ordinary meaning? Can any human being, when he sees the words, doubt what the meaning was? The act having directed, first of all, that an ordinary meeting should take place, and that such ordinary meeting should be held within six months after the passing of the act, and which, according to the operation of the Consolidation Act,—there being nothing provided as to the time when,—would take place in February or August; and having directed what shall be done at the first meeting, which is described to be held independent of the ordinary meeting, the act says: “That, at the first ordinary meeting, to be held in the year next after the year in which such last-mentioned directors shall have been appointed or elected.” Now, the fact was this, that, on the 30th of October, 1846, the first meeting—not the ordinary meeting—the first meeting specially appointed by the special act took place; when there was that species of election of directors which I have described; and what, then, was the ordinary meeting in the year next after the year in which that last meeting was held? The meeting was held in October, in the year 1846, and the next year after that year, as I

(a) 2 Ph. 64.

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understand it, was the year 1847; and I have not heard one single thing which has induced me to entertain the least doubt on the point, because it is quite clear; but though there may be some little difficulty in adapting the language of the Consolidation Act to the overruling language of the special act, no twisting of the words in the Consolidation Act can have the effect of overruling the language of that act which is itself to overrule the Consolidation Act; and it appears to me, it would be a most dangerous mode of construction, to say that the inferior thing which is to be governed by the superior shall itself have such an effect as to give a construction to the words of the special and the ruling act, which those words do not actually of themselves bear, to take away from the words a meaning which no human being can doubt, for the sake of arbitrarily and constructively, but not necessarily, giving them a meaning which they cannot naturally bear. My opinion, therefore, is, that it is quite clear, on the construction of the act, that there ought to have been, in February, 1847, such a proceeding on the part of the then existing twelve directors as would have had the effect of removing from the number of twelve four to be determined by ballot, unless, according to the language of the 18th section in the Consolidation Act, they should otherwise agree.

Now, they neither had ballot nor agreement; and it appears to me the consequence is, that, by that act, contrary to the provisions of the act of Parliament, four persons out of the twelve remained in the situation of directors, in which situation they ought not to be. Well, then, supposing that is the first step, what is the position in which the plaintiffs stand?—and I am now speaking of the case in which the objection is made only by the Company; as to what other objections may be made by other demurring parties, I know nothing; but, it appears on the face of the bill that there was an ordinary meeting. There was also a general meeting,—and, in truth, they seem to have taken place on the same day, by being called at different hours; but this ap-

appears on the face of the bill, that, when some measure was proposed, a gentleman moved a resolution, which was carried by a very great majority ; I think the expression is "unanimously." Well, it appears that the chairman, as it is stated, refused to put the question, and it also appears that the general meeting, of which I have heard so much with respect to its controlling power, has exercised its power, but in vain ; because, though there was a general meeting, and a particular resolution was carried unanimously, the directors, *de facto*, refuse to comply. Is the mockery of having general meetings over and over again to be gone through ? If one disobedience to the voice of the general meeting is not sufficient to prove the insufficiency and the impropriety of the conduct of the twelve directors, how many more are there to be held to do it ? It appears to me that, when once it has been shewn that the great corrective power, viz. the voice of a majority at a general meeting, has been tried in vain, nothing remains then but an appeal to a court of justice.

Now, the bill represents that these twelve gentlemen have got possession of the seal and of the property of the Company, and that they intend to apply it according to their views. I apprehend that every single individual shareholder has a direct personal interest in seeing that the government of the affairs of the Company shall be carried on according to the manner and form which has been prescribed by the act of Parliament ; and it never was intended, from what I have observed going forward—and I have no reason to believe it will ever be allowed, that any set of men, either improperly chosen directors, or improperly continued as directors, shall arrogate to themselves that mode of dealing which virtually would set themselves above the authority of the act of Parliament under which they are constituted. I cannot but think, that, in a question as between the plaintiffs alone, some separate shareholders, and the directors themselves, the thing is reasonably plain. The point that I have to

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determine is this, whether, if a bill is filed by some of the shareholders against these peccant directors and the Company, that bill is improperly filed, because the Company are parties. Now, one thing is reasonably plain, and that is, that the bill could hardly be said to be sustainable if the Company were not parties; that is pretty plain, because the bill seeks to have redress with respect to the proper use and proper dominion of the seal of the Company, and of the property of the Company, including not only its money but its books and papers; and it would be a startling thing to say that the Court itself is to deal with such a subject without having present before it the Company, to whom, in point of law,—I say, in point of law,—they belong. But then it should be considered that, though the act of Parliament has constituted the corporation, yet it has constituted that corporation in a degree not merely as a trustee for the benefit of the shareholders, but as the medium by means of which, by whose instrumentality, and by whose acts the benefit of the shareholders shall be accomplished.

Then the Company object, on the ground—as I recollect, from what has been so very ably urged—that, in fact, this very point has been decided by the Vice-Chancellor *Wigram*, in the case of *Foss v. Harbottle*, whereas it appears to me that that case was totally dissimilar from the present, because there was nothing in that case to shew that the evil complained of might not have been cured by a general meeting, and so proceeding according to the authority of the act of Parliament. There the relief was refused, that is to say, the demurrer was allowed, because it sufficiently appeared on the face of the bill to the understanding of the learned judge, that the Company itself might give the relief which the plaintiff sought to have. It is admitted, and it cannot be denied, that, if the Company seek to do an illegal act, the act of the Company may be restrained; and where is the substantial difference between an injurious activity on the part of the Company, and that injurious passiveness which is repre-

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sented throughout the whole of the bill? Because, if the Company does nothing, and according to this bill is so incapacitated by reason of the fact that the twelve directors have got possession of the seal, and have virtually the dominion over the Company; is, then, that inert, inactive mass called a Company, which will not stir and cannot stir, is that Company to say, because we will do nothing, therefore you (the plaintiffs) shall not have relief? It really appears to me there is no question, but that the Court will interfere as against the Company. The case that was mentioned respecting the Alliance Assurance Company, and several other cases that I might mention, prove in my own mind that I cannot draw any substantial difference between the injury effected by activity and the injury allowed to continue by inactivity; and that objection appears to me, therefore, altogether futile.

One or two other slight circumstances were mentioned, and particularly, as I understand it, it seems to be represented that six might act; it is perfectly true that six might act, and especially as it is said that five might be a quorum. There is no doubt about that, but that is not the point, because if by what has taken place, there ought to be eighteen directors, there must be eighteen proper directors, until the Company have at some meeting resolved that the number shall be altered; and with respect to the twelve, if you find that the twelve have already acted wrongfully, and that now they exist in this character, viz. that eight of them (nobody can tell who) may lawfully be directors, but that four of them (nobody can tell who) ought not lawfully to be directors; you have a mass of twelve men, who all combine together to keep up an objection to themselves to the number of twelve, which at once might be removed if they could only by consent or by ballot remove four and choose some other four. Therefore it seems to me that the conduct of the twelve directors is that of which the plaintiffs have a right to complain; the inertia

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of the Company is a reason why the plaintiffs themselves should come into equity for the purpose of having relief, and the only question is, whether they can have it.

As I understand it, Sir F. Kelly has said, the only relief the plaintiffs can have must be by mandamus; but what is asked by this bill is, not actual relief in this way, that the Court is to determine who are to be directors: but, that the Court shall interfere by restraining these twelve persons from voting or acting as directors of the Company—that they may be decreed to place the common seal of the Company, and all the property, funds and books, and so on, under the control of the lawful directors of the Company, for the purposes of the Company.

That is a species of negative relief, which it is quite competent for the Court to give, because it has been decided, with respect to partial relief, which consists in restraining the party complained of from doing an injury, that he may be restrained, although the Court is not able, and has no authority, either in law or in fact, and could not by any means have the power of granting relief in the whole matter, with respect to a part of which only there has been a complaint.

It appears to me, that that being perfectly settled in this Court, whatever may be the method which may be adopted for the purpose of putting in twelve proper directors in the room of the present twelve directors who are complained of, it is quite competent for this Court to interfere to the extent to which the relief is asked, or to give some portion of that relief, which is quite sufficient for the determination of this demurrer. Therefore, according to the best view of the case which I can take, and I have had an opportunity of considering it in the interval—and it has been argued with great ingenuity and ability,—my opinion is the demurrer must be overruled.

From this judgment the defendants appealed, and, pend-

ing the appeal, the plaintiffs applied to the Vice-Chancellor of England for an injunction in the terms of the prayer of the bill.

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The motion was commenced on the 14th April; but, after hearing the counsel in support, it appearing that the Company had not been served with notice, and the objection having been taken by the defendants, the further hearing was adjourned until the 20th.

On this day Mr. *Bethell*, on behalf of the plaintiffs in the suit, objected to the demurrers in this case being advanced, on the ground that an application for an injunction was then pending before the Vice-Chancellor of England, and that the same counsel could not attend the proceedings in both courts.

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The LORD CHANCELLOR.—My present impression is, that I must allow these demurrers to be heard. It is an application the Court never refuses. Where an injunction is met by a demurrer, the Court, as soon as possible, ascertains whether that demurrer is well founded or not; until that is ascertained, it has no means of knowing whether it ought to entertain the question of injunction or not. I follow the rule of the Court in advancing the demurrer, which must be disposed of before the injunction can be entertained. As to the circumstance of counsel being occupied in two courts, no doubt that is inconvenient to them and inconvenient to the Courts; but in a case where so many counsel are engaged on both sides, the evil is not of a pressing nature.

Application to defer the hearing of the demurrer on appeal until an application for an injunction then pending in the Court below had been decided, refused.

The appeal on the demurrer was then proceeded with.

Sir *F. Kelly*, Mr. *Stuart*, Mr. *Rolt*, and Mr. *G. L. Russell*, in support of the demurrer, [after going through the different clauses in the special and general acts of Parliament, (on which, however, the judgment of the Lord Chan-

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cellor does not turn)], submitted that, if the construction were at all doubtful, the parties applying to transfer the whole powers mentioned in a particular body by the Legislature to another, ought to make out clearly, and beyond all doubt, that the true construction of the act is that which they contend for, and that they ought to arm themselves with the decision of a court of law, by having obtained a mandamus before they applied to a court of equity for an injunction. Admitting that it would be both just and equitable that, if a governing body, to whom extensive powers are entrusted by an act, are bound under the terms of that act to nominate four of their number who are to go out, with a view to four others being elected in their stead; then if they fail to comply, the corporation, their masters, would have a right to apply to the Court of Queen's Bench, in the first place, for a mandamus; and if the Company, whose servants the directors are, should suggest a probable case of injury or of unlawful conduct, they might then obtain an injunction in the meantime, so as to prevent irremediable damage until a court of law had decided the legal question; but no case can be found warranting an application to the Court by individual members only of a corporation. It is a complaint which can only be reasonably and properly made by the corporation at large. The present case is quite distinct from that in which a shareholder, in respect of his individual right, has filed his bill and obtained an injunction to restrain a corporation from doing something which they have no power or no right to do. This case is the converse of that, for it is, in fact, a complaint common to the whole body against the small body forming the direction. If three or four of a large body of shareholders, not pretending to sue on behalf of others, are permitted to file a bill complaining of that which is common to all, it is evident every shareholder has a similar right, and the number of bills filed against the directors may be equal to that of the shareholders. *Ware v. The Grand Junction Waterworks Com-*

pany (a), and *Ward v. The Society of Attornies* (b), are both cases in which an individual has succeeded in obtaining the intervention of a court of law against the directors of a Company; but in both these cases, the Company were wrong-doers; they were attempting to do that which they were not empowered to do. Those are cases in which, on account of the illegality of the act contemplated, the majority cannot bind the minority, and any one of that minority can file his bill in order to protect his individual rights. In the present case, it appears on the bill that the corporate body assembled at the meeting, complained of the acts of the directors; and it is they who are the parties to file a bill. *Foss v. Harbottle* (c) is a case in every respect corresponding with the present one: *Attorney-General v. Wilson* (d).

There is no allegation in the bill that the corporation have been inactive, or have stood by and submitted to any illegal acts of the directors, or have refused to file a bill on the request of the plaintiffs; but in the present case the plaintiffs are identified with the corporate body, and form part of the majority who objected at the meeting to the proceedings of the directors. Under the 90th section (e) of the special act the majority has full power over the governing body, and can come to whatever resolution they think proper. It was objected in the court below that the corporation could not file a bill, because the managing directors had the seal,

(a) 2 Russ. & My. 470.

(b) 1 Coll. 370.

(c) 2 Hare, 481.

(d) 1 Cr. & Ph. 1.

(e) The 90th sect. provides that "the directors shall have the management and superintendence of the affairs of the company, and they may lawfully exercise all the powers of the company, except as to such matters as are directed by this or the special act to be transacted by a


general meeting of the company; but all the powers so to be exercised in accordance with and subject to the provisions of this and the special act, and the exercise of all such powers shall be subject also to the control and regulation of any general meeting specially convened for the purpose, but not so as to render invalid any act done by the directors prior to any resolution passed by such general meeting."

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which, to render it a corporate act, ought to be affixed to the bill; but it was in the power of the Company, by a resolution to that effect, at any time to direct another seal to be made and affixed.

It is contended on the other side, that, in consequence of the twelve directors having neglected to ballot out four of their number, the twelve ceased to exist as directors—now, admitting that a mandamus might issue to compel them to ballot out four, there is nothing in the act which says that they shall cease to be directors—if there were, the effect would have been that if six new directors had not been elected the whole corporation would have been at an end. The directors must continue to fill that capacity until they have ceased to be so under the act of Parliament by which they were appointed. There is nothing in the act to shew that an omission by the directors to ballot shall disqualify them, but the cases in which they may become disqualified are specially set out in the 86th section of the act (a), and by the 83rd section of the act it is provided, “that the several persons elected at any such meeting, being neither removed, nor disqualified, nor having resigned, shall continue to be directors until others are elected in their stead.” If an injunction were granted in the form prayed by the bill, they would be prevented from acting as directors at all, and consequently from doing the very thing which the bill alleges may correct the constitution of the body, viz. determining which four of the directors are to go out in rotation. The relief prayed is contradictory to the case made

(a) 86th section: “If any of the directors, at any time subsequently to his election, accept or continue to hold any other office or place of trust or profit under the company, or be either directly or indirectly concerned in any contract with the company, or participate in any manner in the profits of any work to be

done for the company, or if such director at any time cease to be a holder of the prescribed number of shares in the company, then and in any of the cases aforesaid the office of such director shall become vacant, and thenceforth he shall cease from voting or acting as a director.”

by the bill; cases very like the present one in principle are,—*Reg. v. Alderson* (a), and *Attorney-General v. The Mayor of Norwich* (b).

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Mr. *Bethell*, Mr. *J. Parker*, and Mr. *Willcock*, in support of the bill, [after arguing that the construction of the acts rendered it compulsory on the directors to ballot out four of their number in February, 1847], contended that if such a conclusion were to be drawn, as that it is incompetent to individual shareholders to come into equity, and that the complaint, if founded at all, ought to have been brought by the corporation alone, then the question is, what remedy is afforded by the laws when, in a corporation or a partnership, the governing body refuse to abide by an essential law of that corporation, or that partnership? One of the earliest and oldest heads of equity is, that which has invested its courts with the exclusive right of interfering in all matters of dispute among partners (c), and for this reason, that they are incapable of appearing in courts of law in the relative situation of plaintiff and defendant. And the corporation can neither sue its members nor the members sue the corporation. On the same principle that courts of equity will interfere for the purpose of confining incorporated companies within the express limits of their parliamentary powers, and the statutory directions contained in the act of Parliament creating them, they will interfere between the corporation and its members; for if the act of Parliament is a contract with the Legislature, which the Company is bound to observe as between itself and the rest of the subjects of the country, so the act of Parliament is in like manner the deed of partnership of the corporation itself, to the provisions of which both the corporation and the members are bound to adhere in all matters arising

(a) 11 Ad. & E. 3, and 1 Ad. & E., N. S., 878.

(b) 2 My. & Cr. 406.

(c) Spence's Equity Jurisdiction of Court of Chancery, 665.

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between themselves ; and if there be a transgression or deviation from those provisions, each individual member receives an injury, and has a right to the intervention of this Court to compel the terms under which he became a member of the corporation to be upheld and abided by.

Such a case is presented by this bill, and it is further stated that, not only do the defendants refuse to follow out the directions of the act, but they have so refused in order to promote other purposes at variance with the constitution of the Company, and contrary to the wishes of the majority of the shareholders. The directors, against whom the shareholders are asking relief, intend to bring a bill into Parliament for the purpose of destroying the Company, of which the plaintiffs are members, and uniting it with another railway, a speculation which the Legislature never dreamt of. [The *Lord Chancellor*.—That is a most important question ; because there is hardly a railway which has not done that very thing every session of Parliament. If any one shareholder can come here at the commencement of the session to prevent a company from asking Parliament to allow them to do something not within the original intention of the corporation, we should have the Court devoted to railways all the year round.]

[The argument was then proceeded with:]—The only mode by which an individual can proceed against a company who are exceeding their powers, is by filing a bill in his individual capacity, and making the Company defendants on the record ; for if a bill were filed in the name of the corporation, and the managing body who constituted the majority were opposed to it, it would be competent for them to appoint a person to move for its dismissal, and the object of the individual would be entirely frustrated. In the *Charitable Corporation v. Sutton* (a), relief was granted against individuals of a corporation upon a principle, which,

(a) 2 Atk. 400.

bearing in mind the rule of this Court, that the remedy must be mutual, becomes an authority for holding, that, as the corporation obtained that relief against the individual corporators, so the individual corporators could obtain relief against the corporation. A bill against the managing body of a company is a bill against the corporation itself, which is, in fact, a mere name, brought before the Court to render the administration of justice complete. There are several cases in which relief has been granted to individuals against a managing body or a corporation: *Adley v. The Whitstable Company* (a), *Mayor &c. of Colchester v. Lowten* (b). The Court will apply the same principle to railway companies as between themselves and their members as it will between companies and strangers. Any dealing with the corporate property for purposes not corporate purposes, and any management of the corporation not in conformity with the original designs of the corporation, must be considered as breaches of trust: *Dun Navigation Company v. The North Midland Railway Company* (c). The case of *Kemp v. The London and Brighton Railway Company* (d) shews, that, although there be a remedy at law by mandamus, that does not exclude the jurisdiction of this Court. At common law the Court will not permit a member of a corporation to proceed against the corporation, which is considered as one entire body. The shareholders in railway companies are members of the body corporate by force of their acts of Parliament. In applications by *quo warranto* or mandamus, it is the public proceeds against the corporation: *Mayor &c. of Colchester v. Lowten* (e), *Child v. The Hudson's Bay Company* (f). This Court will exercise its jurisdiction to keep companies within their powers: *Agar v. The Regent's Canal Company* (g), *Blakemore v.*

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(a) 17 Ves. 315.

(b) 1 Ves. & Bea. 247, 248.

(c) Antè, Vol. 1, p. 135.

(d) Id. p. 504.

(e) 1 Ves. & B. 226.

(f) 2 P. Wms. 207.

(g) Coop. 77.

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The Glamorganshire Canal Company (a). It does not require reasons for their not keeping strictly within their powers, but it demands implicit obedience: *Frewin v. Lewis* (b). It is not attempted by the present proceedings to prevent the Company from soliciting a bill in Parliament, but to prevent the persons at present calling themselves directors from exposing the acts of the Company to the imputation of invalidity, and to compel them to ballot out the four members who are to retire, in order to remove the disqualification which, by reason of their refusal to ballot, now attaches to all. The jurisdiction of this Court is quite competent to deal with the present case: *Ellis v. Earl Grey* (c), *Attorney-General v. Forbes* (d), *Speer v. Crawler* (e). [In the course of the argument his Lordship asked the counsel for the respondents whether they could produce any case in which the Court had exercised its jurisdiction against corporate officers upon the ground that they were not entitled to the office they assumed? "For," said his Lordship, "it is quite obvious that if the courts of equity assume this jurisdiction, it is open for every member of a corporation to come and say, that party is not a director, or that party is not a treasurer, and the time of the Court would be consumed in trying the question, who were, or were not, corporate officers."]

During the argument of the demurrer before the Lord Chancellor, the application for an injunction was continued before his Honor the Vice-Chancellor of England, and on the 21st of April he delivered the following judgment:—

THE VICE-CHANCELLOR.—I am of opinion that I ought to grant the injunction; I say so of course on the supposition that that is the rule of law which I adopted when I decided the question on the demurrer; and I am aware

(a) 1 My. & K. 154.

(b) 4 My. & Cr. 254.

(c) 6 Sim. 214.

(d) 2 Cl. & Fin. 48.

(e) 17 Ves. 216.

that I am only doing that which, perhaps, may ultimately shew that there has been a great deal of time wasted, because the Lord Chancellor may entertain a different opinion; but as the parties have brought forward the motion immediately after the decision of the demurrer, I can do nothing else than proceed upon the ground which I have thought it right to adopt.

I am willing to admit that if it could be made out that the only object of the parties was to have a thing done which ought not to be done, that might be a very good reason for refusing the application, or if it could be made out that the effect of granting the application would be to prevent the doing of that which the Legislature has contemplated might be done, and which the interests of the Company and of the public require should be done, that would be a reason for refusing the injunction. But with respect to the first part of the case, I put out of consideration everything that has been said of a vituperative kind with respect to the conduct of either of the parties. That the North Western Railway Company and the Great Western Railway Company were in deadly hostility to each other is perfectly notorious to everybody, and, to a certain extent, the Legislature decided one question between the two parties by passing the Birmingham and Oxford Railway Act in the terms in which we find it, by means of which act, to a certain extent, there may be measures taken for the purchase by the Great Western Railway Company of the Birmingham and Oxford Railway; but upon the face of the act, although the power of sale is a power which is only for the purpose of enabling the Great Western Railway Company to become the purchasers, though the power is only in that form, so that it would exclude the Birmingham and Oxford Company from selling to any other person, yet even the power of sale, if the option to exercise it is used, cannot itself be effected without the interference of the Legislature upon the face of the act which constituted the Birmingham and Oxford Com-

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pany; because there is a section which provides that until there be a certain reduction of the tolls of the Great Western Railway Company, that the thing shall not take place.

By the agreement of the 12th of November, the Birmingham and Oxford Railway Company have agreed with the Great Western Railway Company, not simply to sell the Birmingham and Oxford Railway to the Great Western Railway Company; but the agreement is an agreement in which a third party is introduced, and another Company is made the subject of the agreement, that is to say, the Birmingham, Wolverhampton, and Dudley Railway Company are made parties; and the contract is not a contract to sell simply to the Great Western Railway Company the Birmingham and Oxford Railway, but to have an amalgamation of the Birmingham and Oxford Railway Company with the Birmingham, Wolverhampton, and Dudley Railway Company; and then the two amalgamated railways are to be sold to the Great Western Railway Company, and it is perfectly obvious, that that itself cannot take place, except under the authority of the Legislature.

Well, then, it appears that some steps having been taken towards effecting this agreement, the North Western Railway Company put themselves in motion, and they certainly have done, as I understand it on the affidavits, what appears to me it was perfectly legal to do, that is, by means of purchasing shares of shareholders in the Birmingham and Oxford Railway, they have raised up a party among the shareholders in the Birmingham and Oxford Company hostile to the carrying into execution the agreement of the 12th of November.

Now I really do not see that there is anything illegal in that, or that there is anything in it which might not lawfully be done; because, if the Legislature having intimated, to a certain extent not absolutely, not irrevocably, not irreversibly, an intention that the Birmingham and Oxford Railway should be sold to the Great Western

Railway Company, the Legislature has thought proper to express it by this special act, in such a manner as, in the first place, to allow the thing not to be done: and, in the next place, by being aware, as the whole transaction shews, of the hostility which the North Western Company had towards the Great Western Company, being aware of that, have, nevertheless, not in terms, disabled the North Western Company from taking such steps as the North Western Company have actually taken for the purpose of preventing the accomplishment of the agreement of the 12th of November. The parties on each side have only been doing, as far as the agreement was concerned, what they might lawfully do; and I cannot but regard this circumstance as a very great ingredient in the case, that, whatever the parties may intend to do, Parliament itself ultimately must decide what shall be done, and all that is necessary is that the matter shall be brought before Parliament, and then it will decide, in the first place, if it thinks proper to pass the preliminary act which is contemplated in the special act as necessary for the sale at all, as to the reduction of the tolls of the Great Western Railway, or Parliament may either pass an act to reduce the tolls, or declare that the provision in the section in the special act, which has required the tolls to be reduced as preliminary to a sale, shall be repealed; and Parliament may also determine what shall be done and what is right to be done with respect to any sort of domineering influence which the North Western Railway Company may have acquired by means of purchasing shares in the Birmingham and Oxford Railway.

It is totally unlike the case of any private matter in which there is an attempt made to do that which is dishonest, or in contravention of an agreement, and so on: there is nothing like it; and I cannot but think that if the Legislature had expressed no stronger wish than I find here, and had taken no preventive measure to prevent the possibility of that arising which has actually arisen, my

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opinion is that the parties have only done that which legally they might. Besides, it is to be considered that ultimately the sale may never take place. What is to be done then? The parties who have become shareholders in the Birmingham and Oxford Railway Company, either by original subscription or subsequent purchase of shares, are parties whose rights must be regarded; and I apprehend that nothing that has been done has at all taken away the rights of the individual shareholders to say, according to the principles which I laid down in deciding the demurrer, that we shareholders insist on having our Company governed according to the manner and by those persons whom the special act has appointed to be the governors. Then, upon the decision of the demurrer, this certainly does appear that four persons out of the twelve have, by not going out as they ought to have done, produced consequences which, I think, has made the twelve incompetent to act; and I observe, that the bill itself expressly states that the twelve are incompetent to act, states it in words, I mean, adopts the very proposition, and states that the six are the only persons who are competent to act. Now I admit then, if that be so, that the remaining question is to be dealt with. Will the interference of the Court to prevent the twelve from acting at all, necessarily produce any great amount of mischief to the Company? Now I must say my opinion is, that it will not on the words of the act of Parliament, because it appears to me that, on the construction of this Act of Parliament, if any of the directors—if any number of them—became incompetent to act, the others may still act. It appears by the 89th section, that five cases are provided for by the act of Parliament: I am speaking now of the Consolidation Act; “if any director die,” that is one, “or resign,” that is two, “or become disqualified,” that is three, “or incompetent to act as director,” that is four, “or cease to be a director by any other cause than that of going out of office

by rotation as aforesaid," which is the fifth ; "the remaining directors, if they think proper so to do, may elect in his place some other shareholder duly qualified."

Now as to the words "or cease to be a director by any other cause than that of going out of office by rotation," it appears to me that that cessation is in terms by adopting the very word "cease," a reference to the provision of the 86th section, which 86th section has provided four cases in which the directors shall cease from voting or acting as directors. I need not go through the four, because they relate to circumstances which are not now before the Court; and it appears to me, therefore, that the act of Parliament has expressly contemplated that there may be an incompetency, and there may be a disqualification quite consistent with the fact, for it necessarily presupposes it of a person incompetent or disqualified being a director. And what is now alleged before me is this, that if the Court itself interferes to prevent the twelve from acting, that will disable the other six, and that none of the affairs of the Company can go on. I should think it an absurd method of relieving a Company from a difficulty to say, that they shall not go on or act at all; but if I find the general act so constructed as to allow the affairs of the Company to be managed by those who have in one of five specified events the discretion to appoint other directors, that necessarily implies that they may act as directors themselves. I do not mean to be understood as saying that the powers of the 89th section could be applied in the present case; I think it doubtful whether they could be applied to the present case, and for this reason, because the section goes on to say, "and the shareholder so elected to fill up any such vacancy shall continue in office as a director so long only as the person in whose place he shall have been elected would have been entitled to continue if he had remained in office." Now it is to be observed that if, under the powers of this section, twelve gentlemen were elected in lieu of the twelve, nobody could tell how the rotation would go on, and

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Therefore it rather strikes me that though the section shows that the remaining six may act as directors in case of twelve becoming incompetent, that still under the circumstances of the case the defect in the governing body, by reason of the incompetency of the twelve, could not be supplied by the six, but nevertheless the six remain as acting directors; and my opinion is, that if, under the circumstances of this case, on the right of the plaintiffs to have their governing body constituted according to the act, it does appear that the twelve have so acted, by neither using ballot nor agreement, for the purpose of determining who shall go out on the 27th of February, that they have placed themselves in such a situation that they ought to be restrained from acting; and I think that that act should be followed up by an order of this Court, that they shall not act as directors: that they have become incompetent to act as directors, and leave the remaining six at liberty to conduct the affairs of the Company according to their discretion; and therefore my opinion is, that the injunction should be granted.

April 28.

The LORD CHANCELLOR on this day delivered the following judgment on the demurrers:—This is a case in which four persons, not alleging distinctly that they are shareholders in a railway company, but describing themselves as shareholders in a railway company, file a bill in which they allege that, owing to circumstances which I do not particularly enter into, twelve persons who were originally appointed directors ought, at a day now passed, to have voted or balloted out four of their number, under the provisions of the act by which they were constituted, and to have elected four others in their place; that they omitted to do so, and that consequently there is not now such a body of directors as was contemplated by the act, and they therefore pray for an injunction against anything being done by them. The terms of the injunction prayed are, that those twelve persons may be restrained by the injunc-

tion of the Court from voting or acting as directors, or director of the railway company, and that they may be ordered to place the common seal of the Company, and all the property, and funds, and deeds, and so on, in their possession belonging to the Company, into the hands of six other persons, whom they allege were appointed directors under the provisions of the act authorising the Company to increase the number of their directors from twelve (the number originally contemplated) to eighteen. The result therefore of the injunction prayed is, that twelve out of the eighteen who are now exercising the functions of directors may be restrained from acting, and the whole duties of the Company may be performed by the six.

Now the first thing that occurs on that injunction is, that there is nothing in the bill which prays the Court to set right what is alleged to be an error; but there being four who ought, according to the allegations in the bill, to have gone out of office, and it being, as the bill alleges, impossible to ascertain which of the twelve are to be the four to go out of office, it assumes that the whole twelve are illegally exercising the functions of directors, and that they ought all to be restrained from performing the duties of the Company as directed by the act.

Now great difficulties arise on the construction of the act, and it is not my intention to give any opinion upon it, because I think I see quite sufficient to make it my duty to allow these demurrers without reference to the construction to be put on the act, and one of the grounds on which I have come to that conclusion is, that it is not within the jurisdiction of the Court to entertain that question at all. I abstain from giving any opinion on a matter which, according to the opinion I have formed, is not within the jurisdiction of the Court.

The bill is, as I stated, a bill by two of the shareholders, not alleging that they are suing on behalf of themselves and others, but in their own individual right. It is

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quite clear, that some years ago nobody could have entertained a doubt about such a bill being demurrable. But the rule of the Court has been in some respects relaxed, in order to meet the exigencies of modern times, and to adapt itself to the different cases that come before the Court, it being thought that adherence too strictly to the former rule would operate as a denial of justice, and leave parties who have real grievances without a remedy. But the relaxation of this rule ought not to extend, and has never been extended, beyond the exigencies of the case itself; it has been enlarged only where it appears that, unless the Court had adopted that course, there would be no remedy for the grievance complained of.

Now I see in this bill, not only no such case of necessity, but the most obvious, the most reasonable, and the most accustomed mode of correcting the grievance alleged to exist, if it does exist, is to be found even in the allegations contained in the bill itself. When first the rule was so far relaxed as to enable certain persons, interested shareholders, to sue on behalf of themselves and others, it was confined to this, and must still be confined to this, that there must appear to be an evil complained of common to all those on whose behalf the suit was instituted, because then there is a common object and a common purpose, and the interest of those who are not on the record may very well be represented by others who are on the record, and whose interests are bound up with, and are identical with the interest of those not on the record. That was the case of *Taylor v. Salmon* (a), and *Wallworth v. Holt* (b); and, acting on that rule, the distinction is taken, and is the very foundation of the course then adopted,—if there be not one object, if the suit be adverse to the interest of any of the shareholders, then they cannot, of course, be represented by those who are on

(a) 4 My. & Cr. 134.

(b) Id., p. 619.

the record, asking for that the granting of which would be, or possibly might be, injurious to the interests of the persons that should be represented. In that case they must be made defendants, however numerous they may be, because each and every of them may have a case to make, adverse to the interest of the party suing. If they are so numerous that it is impossible to make them defendants, a state of things arises for which at present no remedy has been administered, but that is not an inconvenience arising in the present case at all.

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Now, in the first place, in these cases, where the common interest, where the interest of a multitude of people, is asserted by some few suing on behalf of themselves and others, all either directly or indirectly, either as plaintiffs or as represented by plaintiffs, are supposed to be parties. They are not all parties, in fact; they do not appear separately, but the Court permits,—as it has done in other cases, where there was no possible objection to that course of proceeding,—it permits the plaintiffs to represent them, and to litigate the matter on behalf of themselves and others; but in no one of these cases has it ever been permitted for one or two to institute a proceeding common to all, and affecting to be made for the benefit of all, in their own individual names only; and the evil consequence of that will be found perfectly apparent; because, if it were to be permitted to one or two, it must be permitted to each and every of them just the same; and there might be as many bills filed as there are shareholders in any one of these companies, all praying the same thing, or something different,—it is quite immaterial which,—but all raising the same question in a hundred or a thousand suits.

Now, that has never been permitted; there has never been a case in which individuals not suing on behalf of themselves and others have been permitted to bring before the Court a question common to all. If they have an individual case, of course they may come before the Court, in

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the same manner as a creditor in an administration suit may file a bill for his own debt, but he cannot file a bill to administer the estate without associating with himself those who are interested with him in such administration. He may file a bill to get his own debt paid, but he cannot administer the estate; the others have no interest in the debt which he wishes to be paid, but the others are interested in a proceeding which leads to the administration of the property in which they have a common interest. I think, therefore, if even there was no other objection to the present suit than the shape and form in which the bill is filed by persons in their own individual character, and not professing to act on behalf of themselves and others, it would be fatal to the bill as it now stands. No doubt that might be very easily corrected by amendment, and therefore it would not lead to any decision which would operate as disposing of the question between these parties.

But there is another and much more important question which arises and exists in the present suit. This is a bill by two persons interested in the prosperity, we will suppose, or at all events members of that corporation as shareholders. What is complained of, is not personal to themselves at all; it is, if true, a usurpation on behalf of the twelve persons claiming to be directors, who are, according to the construction put on the act by the plaintiffs, not entitled to that character, or four of whom are not entitled to that character; it is therefore a usurpation of the rights of the corporation. They say they have got their seal; they say they have got their property; they are treated by the bill as persons who have improperly possessed themselves of this interest belonging to the corporation; and therefore it is prayed that they may hand over all they have in their possession to those who, according to the bill, are the persons who are the proper directors of the existing company.

Now, a case in principle identical with the present I

think is the case before the Vice-Chancellor *Wigram*, of *Foss v. Harbottle* (a); that case has been attempted to be distinguished from this, but I think that attempt has entirely failed: that was precisely the same case. There there were two persons, members of a corporation, who complained of certain acts done by persons having exercised the functions of the corporation. It may indeed be a much stronger case in support of the bill than exists here, because it made a complaint of malversation on the part of those who were exercising the functions of the Company, by which no doubt the interest of the plaintiffs as well as the other shareholders would be affected. The Vice-Chancellor *Wigram*, after examining all the cases, came to the conclusion that such a bill could not be supported. It is said, indeed, that one reason for his coming to that conclusion was, that it appeared on the face of the bill that there existed in the Company the means of rectifying the evil complained of; and that the shareholders might, by a general meeting, put an end to the state of things which formed the complaint set forth in the bill. That was the mode, and the only mode, in which that case was attempted to be distinguished from the present.

Now, it appears to me quite clear there is precisely a similar allegation in the present bill, because this bill alleges that there is a usurpation of the rights of the Company, and a large majority of the shareholders of the Company are also of that opinion. There is nothing to prevent the Company therefore, *qua* Company, if they are of the same opinion with the plaintiffs, from proceeding in the mode which will put an end to this matter, if it be illegal, that is to say, if it be that which is not proper under the constitution of the act under which the Company exist. What allegation is there on the face of this bill that the Company, who are properly the parties to complain, will not

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(a) 2 Hare, 461.

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complain, or that they cannot file a bill themselves, in order to obtain the relief which this bill prays? None whatever. There is no allegation; on the contrary, they shew if they were so minded, they might have done so; but there is no allegation to shew they cannot, and no allegation to shew that, on the application of those interested under them, they have refused to do so. From anything that appears, the Company, if they are all of the same opinion, may file a bill, a legitimate bill, that would justify the complaint made by this bill, and ask for that relief which will free them from the difficulty and the objection that exists in the present case; and then there will be plaintiffs, a legally constituted body authorised by the act to represent the interests of the different shareholders in that Company, asking relief against those who are alleged to be usurping the interests of the Company. I, therefore, do consider the case of *Foss v. Harbottle* (a) as identical with the present case; and in everything there stated which is necessary to be considered for the purpose of ascertaining whether, according to the rules of this Court, the present bill could be maintained, I quite concur; and, as that judgment, which was very much considered, and very elaborately delivered by the Vice-Chancellor *Wigram*, very fairly and properly exhibits what the principle and practice of the Court is under those circumstances, I do not think it necessary to go further into the matters suggested by it, than to say, I entirely concur with that judgment; and, finding this question falling within all the principles on which that judgment proceeded, I cannot for a moment hesitate to adopt the opinion expressed by the Vice-Chancellor *Wigram*, and to apply the judgment he pronounced to the present case.

But there is another thing behind, even if all this were not in the way of the plaintiffs, which must be very carefully considered before any other attempt is made to apply to this Court in a case similar to that stated in this bill;

(a) 2 Hare, 461.

there is nothing alleged on the face of this bill at all by which the plaintiffs have any interests personal to themselves. It is altogether a statement of facts, alleged to be an injury to the Company; and the ground, the only ground, on which that complaint rests is, that those who profess to hold the office of directors are not directors,—that the office which they profess to hold in the corporation of which they are members, does not give them a legal title to the character which they profess, and that they are professing to be directors, whereas they, in point of fact, are not: all turning, therefore, on the question whether they are or are not entitled to the corporate office of which they profess to exercise the functions.

Now, I asked several times during the argument, whether I could be referred to any case in which this Court had exercised jurisdiction on a statement of facts confined to what I have now stated, where the whole turns upon the legality or illegality of the title of those who profess to exercise the office? That they may be trustees, founded on the supposition of their being corporate officers, is quite immaterial, because the preliminary fact is,—Are you or are you not corporate officers, as you profess to be? Now no case has been cited; ample time was afforded, during the course of the argument, by the interval of several days which occurred, and the counsel, who, no doubt, exercised all their usual diligence and industry, could find none. When I asked the question, I certainly had no doubt in the world of the result of the answer which ought to be given to the question; but I am very glad the counsel had an opportunity of searching, in order to see whether I might have been under an error in that respect; but their not producing any such case satisfied me that no such case exists. This is the first attempt that ever has been made to call on this Court to exercise jurisdiction under these circumstances. It will be sufficient for me to state that I will not embark in a

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jurisdiction of which it will be extremely difficult to find the limits or the end, or to anticipate what might be the result of assuming such jurisdiction. None of my predecessors have done it, and I will not be the first myself to commence it.

Quite independently of the great inconvenience which would arise from assuming a jurisdiction of that sort, it is contrary to all the principles of equity to entertain it here; it is a pure question of law; there is no equity in the case at all; there may probably be certain proceedings depending on that question of law; but the fact, whether these are corporate officers or not, is not a question of equity; it is a pure question of law; and, in this instance, I am called upon to exercise that jurisdiction (which, if the Court thinks it a proper case for a court of equity, it might be proper to exercise) before the preliminary fact, whether these parties are corporate officers or not, is ascertained. In a court of law, other modes are open by which that question can be tried, and I will not be the first to assume the jurisdiction of bringing it into a court of equity. Consider for a moment what would be the consequence. If I were to do that, it is not pretended that I can give directions to set the corporate body right, if they have got wrong; I am not asked to do it; this bill does not ask me to direct that a meeting be held in order to decide which of the four officers ought to have gone out, and if so, then to direct that that which is wrong may be set right. It is not pretended that I have any jurisdiction to do that; but I am asked to restrain the twelve directors from acting. Then am I not asked to do that which puts an end to the corporation altogether? If they have got wrong, and I cannot put them right, and because they are wrong I am to prevent them from acting, I might be putting an end to the whole corporation by my injunction. It so happens that six new directors have been appointed; but, supposing

that ~~six~~ had not been appointed, there would be nothing but the remaining twelve. Then these persons come here and say, four out of these twelve ought to have gone out, and because they did not go out, the whole of the twelve are not entitled to act as directors,—because there are four amongst you who are not directors, and you profess to act together, let a court of equity restrain you, all the twelve, from exercising your functions at all; and these shareholders in this railway Company, professing to have the interest of the railway Company at heart, and putting themselves forward on the present occasion as litigating for the benefit of the railway Company, and ~~at the~~ expense of the Company, ask me on behalf of that Company to assume a jurisdiction which will probably in this case, and no doubt would in many others, lead to an entire stoppage of the whole functions of the Company.

These are three reasons, any one of which appears to me sufficient to shew that this Court ought not to exercise the jurisdiction which it is asked to exercise; and, therefore, it would not only be unnecessary but improper for me to pronounce any opinion upon the merits of the case when these preliminary objections prevent me from exercising the jurisdiction of the Court. I am therefore of opinion that the demurrers must be allowed.

On the application, by Sir *F. Kelly*, for the dissolution and costs of the injunction before the *Vice-Chancellor of England*, his Lordship said:—As I am of opinion there was no foundation for the bill, so I am also of opinion there was no foundation for the motion for an injunction in the Court below, and the injunction granted must be dissolved.

The defendants are entitled to their costs of the motion in the Court below, but not to any here.

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1846.

COURT OF EXCHEQUER.

In Michaelmas Term, 1846.

KNIGHT v. BARBER.

Scrip certificates of railway shares are not "goods, wares, or merchandise" within the Stamp Act. The defendant verbally agreed to purchase of the plaintiff fifty scrip certificates of shares in a railway company, at a stated price; subsequently, on the same day, the defendant signed a memorandum setting forth the terms of the agreement, and caused it to be delivered to the plaintiff:—*Held*, that this memorandum was the contract of sale, and required an agreement stamp.

ASSUMPSIT for not accepting and paying for fifty scrip shares in the Huddersfield, Halifax, and Bradford Railway Company.

Plea, *inter alia*, non assumpsit.

The cause was tried at the Summer Assizes, 1846, at Liverpool, before *Cresswell*, J., when it appeared, that, on the morning of the 12th of the previous August, it was verbally agreed between the plaintiff and the defendant, that the latter should buy of the former the shares in question, and in the afternoon of that day the defendant signed the following memorandum, in order that it might be shown to the plaintiff:—"Bought of Nathan Knight, (plaintiff,) fifty shares in the Huddersfield, Halifax, and Bradford Railway Company, at £10 per share." This memorandum was lost, but a witness stated its contents; it appeared that it was unstamped. The counsel for the defendant thereupon objected that this memorandum, being the evidence of the contract, and being unstamped as an agreement, secondary evidence of its contents was inadmissible, and that the plaintiff ought to be nonsuited. The learned Judge being of this opinion nonsuited the plaintiff.

Baines, Q. C., now moved for a rule to set aside the nonsuit, and for a new trial on the ground of misdirection (*a*). The contract declared upon was not that contained in the

(*a*) Before *Pollock*, C. B., *Parke*, B., and *Rolfe*, B.

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memorandum, but arose out of the verbal agreement in the morning, which constituted a complete contract, and the memorandum was a mere acknowledgment of one of the parties, of the antecedent parol contract, and binding only on one party, and according to *Beeching v. Westbrook* (a), and *Vaughton v. Brine* (b), did not require to be stamped. [*Parke, B.*—The memorandum was to be shown to the plaintiff, and was given to him; it was therefore to be evidence of the contract, whereby the defendant intended to be bound.] But secondly, this was an agreement made for, or relating to the sale of “goods, wares, or merchandise,” within the 55 Geo. 3, c. 184, tit. “Agreement,” and is therefore within the exemption of the Stamp Act. These perhaps would not be goods, wares, and merchandise within the 17th section of the Statute of Frauds, *Humble v. Mitchell* (c): but they would be goods and chattels within the Bankrupt Act, *Lawton v. Hickman* (d). [*Pollock, C. B.*—No doubt, but that is under the word “chattels.”] Scrip differs from shares transferable only by deed; it is merchandise, because it is the subject of sale. [*Parke, B.*—It is the subject of sale amongst speculators, but not as an article of commerce; it is merely an assignment of a bargain. *Rolfe, B.*—Can lands and houses be considered merchandise, because they are saleable; or can foreign bonds? *Pollock, C. B.*—Is the sale of a pawnbroker’s duplicate within the exemption?] Then thirdly, no stamp was necessary, the document was a mere acknowledgment, binding on one party only: *Vaughton v. Brine* (e). [*Parke, B.*—It is unnecessary that both parties should be bound; where they intend the document to be evidence of a contract it falls within the Stamp Act.] *Pollock, C. B.*, referred to *Hughes v. Budd* (f).

(a) 8 M. & W. 411.

(d) Ante, Vol. 4, p. 336.

(b) 1 Man. & Gr. 359; S. C. 1 Scott, N. R. 258.

(e) 1 Man. & Gr. 359; 1 Scott, N. R., 258.

(c) 11 Ad. & El. 205.

(f) 8 Dowl. 478.

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POLLOCK, C. B.—I think that there is no ground for a rule in this case, and I entirely concur in the ruling of my brother *Cresswell*. It is said, first, that the contract consisted of what took place in the morning of the day in question by word of mouth, and that the written document ought not to be resorted to. It appears that at the trial the witness was asked whether the agreement in the morning was not subsequently reduced into writing, and, upon his answering in the affirmative, the writing was required to be produced, that was almost in terms an admission of its being the contract. But I think it is a conclusion of law, that where parties make an agreement by parol, the terms of which are afterwards reduced by the parties into writing, that writing constitutes the agreement. Where they discuss a question in the morning, and in the afternoon put down the result in writing, the inference is, that they mean to abide by what they have written. Where there is a discrepancy between the words and the writing, there cannot be a doubt that the writing must, as a matter of law, prevail. There was therefore, in this case, a contract of sale, and a memorandum of agreement binding the defendant, which required a stamp. The next question is, whether the sale of scrip is a sale of “goods, wares, or merchandise.” I think it is not; the sale of scrip is merely an agreement for the transfer of the interest which the party may thereafter possess in the capital of the Company, and that interest does not come within the description of “goods, or wares, or merchandise.”

PARKE, B.—I am of the same opinion; as to the first point, that there was a distinct parol contract between the parties before the memorandum was signed, if that memorandum was afterwards made and signed by the defendant, and intended to contain the terms of the contract, and to be acted upon by the plaintiff, it became, when acted upon, the real contract between the parties. The parol

agreement goes for nothing if it was intended that it should be reduced into writing, and that was afterwards done. But what took place in the morning between the parties was in truth a preliminary conversation; the real contract was expressed in the written instrument, which contained the terms of that which both parties meant to be the contract. As to the other point, even supposing we were to adopt the language of my brother *Erskine*, J., in *Vaughton v. Brine*, that such agreements only as would be evidence against both the contracting parties, require to be stamped, the memorandum in question falls within that definition, though I am disposed to think that the correct rule is that which is attributed to me in the case of *Beeching v. Westbrooke* (a), that a written instrument, to come within the terms of this clause of the Stamp Act, must have been made with the intention of containing in itself, the terms of the agreement between the parties. The Stamp Act extends to all documents intended to be evidence of a contract; and on this principle I think that the memorandum requires a stamp. Then as to the exemption clause of the Stamp Act, as to "goods, wares, and merchandise," a judicial construction has already been put on these contracts, as affected by the Statute of Frauds, and it appears to me that the same construction applies to this case. The exemption was intended to protect bonâ fide mercantile transactions of the sale and purchase of goods, but this is a mere agreement between speculators, respecting their right to obtain shares in a Company as soon as it is formed. I think that a sale of scrip can in no sense be said to be a sale of goods, wares, or merchandise, and that this rule ought to be refused.

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ROLFE, B., concurred.

Rule refused.

(a) 8 M. & W. 411.

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IN THE COMMON PLEAS.

GILES v. TOOTH.

Nov. 14.

GILES v. Ten Others in separate Actions.

Plaintiff having brought eleven actions against eleven of the members of the provisional committee of a railway company, sued each separately for the same cause of action. A rule obtained by the defendant to stay proceedings in all the actions except such one as the plaintiff should elect, discharged.

ELEVEN actions having been brought by the above-named plaintiff against eleven provisional committeemen of the Tonbridge and Rye Harbour Railway Company separately for the same cause of action, the declaration and particulars of demand in each case being the same, a rule was obtained by *Bramwell* calling upon the plaintiff to shew cause why all further proceedings should not be stayed in each of the actions, except such one as the plaintiff should elect, until the Court should otherwise order. The rule was moved for upon affidavits, stating that the plaintiff's claim, if he had any, was against the defendants jointly, and not separately.

Channell, Serjt., and *Piggott* shewed cause (*a*).—This Court has no jurisdiction to make the proposed rule, it is not a consolidation rule binding the defendants by the verdict in one action; and even if it were, though the defendants would be bound by the verdict in one action, the plaintiff would not: *Anderson v. Towgood* (*b*), *Doyle v. Anderson* (*c*). In *Bartlett v. Bartlett* (*d*), and *Carne v. Legh* (*e*), the proceedings were stayed, but upon payment of debt and costs. The defendants may, if they choose, plead in abatement, or, in the case of judgment in any one action, the other defendants may plead it in bar, or, after

(*a*) Before *Wilde*, C. J., *Coltman*, J., *Maule*, J., and *Williams*, J.

(*b*) 1 Q. B. Rep. 245.

(*c*) 1 Ad. & Ell. 635.

(*d*) 4 Man. & Gr. 269; 4 Scott, N. R., 779.

(*e*) 6 Barn. & Cres. 124; 9 D. & R. 126.

execution in one action, the other defendants may proceed by *auditâ querelâ*. They also cited *King v. Hoare* (a), *Sharp v. Lethbridge* (b), Bac. Abr., tit. "Audita Querela," B., *Pechell v. Layton* (c).

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Bramwell, in support of the rule.—A consolidation rule cannot be consented to, because some of the defendants dispute their liability; but the Court has a summary jurisdiction, and has exercised it in many cases for the benefit of defendants, where they have a defence which would be difficult or expensive to put upon the record: *Everett v. Youells* (d), *Humphreys v. Knight* (e), *Sadler v. Cleaver* (f), *Miles v. Inhabitants of Bristol* (g); and here the defendants have a defence by plea in abatement. He also cited *Jefferies v. Sheppard* (h), *Lamb v. Nutt* (i), and *Pechell v. Layton* (k). He stated that similar rules were pending in the Courts of Queen's Bench and Exchequer on this subject.

WILDE, C. J.—The rules now depending in the Courts of Queen's Bench and Exchequer are totally different from the present. They are consolidation rules, in which, if the plaintiff in such actions succeeds in fixing one, the judgments against the others follow. Whatever, therefore, may be the decisions of those Courts, they can afford no analogy to the present case.

This rule calls upon the plaintiff to shew cause why all further proceedings should not be stayed in each of the eleven actions, except such one as the plaintiff shall elect to proceed in, until the Court shall otherwise order; and the ground on which this is asked is, that the defendants

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| (a) 13 Mee. & W. 494. | (f) 7 Bing. 769; 5 M. & P. 706. |
| (b) 4 Man. & Gr. 37. | |
| (c) 2 Term Rep. 512—712. | (g) 3 B. & Ad. 945. |
| (d) 3 B. & Ad. 349; 1 N. & M. 530. | (h) 3 B. & Ald. 696. |
| (e) 6 Bing. 572; 4 M. & P. 375. | (i) Tidd's Prac. 528, 9th ed. |
| | (k) 2 Term Rep. 512. |

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are placed under peculiar hardship, and have a circuitous remedy by which they may substantially obtain the same relief: and, therefore, that the Court, in conformity with the principle on which it usually acts, will interfere summarily. That the defendants are under peculiar hardship, can furnish no ground for preventing the plaintiff from exercising his legal right, or for the interference of the Court, unless it can thereby give him substantially the same benefit. We have no right or authority to relieve the defendants at the expense of the plaintiff. Then, have the defendants made out that they have a right to a circuitous remedy against the plaintiff? First, they say they cannot practically plead in abatement the non-joinder. If so, that relief is gone; and why? because they have joined a partnership of such a nature that they are practically excluded from that plea. The defendants cannot, therefore, give the plaintiff the benefit of a better writ, which is the effect of a plea in abatement. Why, then, are we to give them the same relief as they would have had upon a plea in abatement? The Legislature has said, that the defendants shall only have the benefit of a plea in abatement for non-joinder upon certain terms, to prevent injustice to plaintiffs; we are asked to give the defendants the benefit without those terms, against the intention of the Legislature. The hardship of which the defendants complain arises out of the peculiar nature of the association into which they have entered. That was their own voluntary act, and it is no ground for our casting any inconvenience on the plaintiff. Then if the defendants have failed to make out, that they have a circuitous remedy, is there any abuse of the process of this Court?—any improper motives in the proceedings which call upon the Court to interfere? On the contrary, the circumstances of the case show that the plaintiff is only exercising his legal rights, and that there has been on his part no such abuse or oppression. Why then, should this Court interfere in a case of this kind,

where it would be difficult for the Court to give the defendant any substantial relief which would not give rise to some new question of law, or some new difficulty, or prejudicially affect the plaintiff's rights? If there be hardship in the present state of the law, application must be made to the Legislature to alter it. If the terms offered give the plaintiff the same rights which he now has, his refusal to accept those terms might shew oppression; but though the terms offered are perhaps reasonably fair, and all that in this case the defendants could offer, the Court does not feel that they are such as the plaintiff is entitled to. Although desirous, if possible, of relieving the defendant, I see no mode of doing so. This rule must therefore be discharged.

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COLTMAN, J.—The grounds for this application have failed. The defendants have not shewn that they have another but more circuitous remedy, nor have they shewn any oppression on the part of the plaintiff. If a case of oppression had been shewn, there might have been some ground for the interference of the Court; but the bringing the different actions is not an oppression, because the case against each party may stand on very different grounds. If all these defendants are joined in one action the plaintiff might be nonsuited, unless he proved a joint claim against all.

MAULE, J.—I am also of the same opinion, and think that this rule must be discharged. In this case, the plaintiff makes a demand for which several persons may be differently liable. He may have a difficulty in shewing that they are all jointly liable, and cannot therefore safely, so sue them; and he has a right against each separately, subject to the defendant's right to plead in abatement the non-joinder, which the defendants say, and probably with

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reason, they cannot in this case exercise. The plaintiff therefore, having a demand against eleven, and knowing that he may fail against some, brings his action against each. The justice of this case is, that the plaintiff should be allowed to enforce his demand against as many of the joint contractors as he can, and to get from each as much as he may be able, until his demand is satisfied. Now he cannot, as shewn by my Brothers, join them all with safety. Yet the defendants ask the Court, summarily and unconditionally, to stay the proceedings in all but one action. But that I think we cannot do, as the plaintiff has a right to do what he is doing. The cases cited on behalf of the defendants are very different from this, and have only a very remote bearing on the present question; those cases only shew that, in certain cases, the Court will exercise an equitable jurisdiction where there is an equitable right, such as in requiring particulars of demand. Such generalities can, however, have no effect upon the decision of this case. Here the plaintiff has a right to do what he has done, and he could not fairly enforce his rights by any other course of proceeding; and the defendants cannot suggest any means by which they may obtain the advantage they seek without infringing upon the legal rights of the plaintiff.

VAUGHAN WILLIAMS, J., concurred.

Rule discharged, with costs.

See *Newton v. Blunt*, *Newton v. Belcher*, and *Rendel v. Mallett*, post.

1846.

IN THE COMMON PLEAS.

Michaelmas Term, 1846.

PILBROW v. PILBROW'S ATMOSPHERIC RAILWAY AND
CANAL PROPULSION COMPANY.

Nov. 23.

THIS was an action on two contracts, under the common seal of the Company, who had obtained a certificate of complete registration, under 7 & 8 Vict. c. 110, and had registered as their place of business, "No. 6, King William-street, in the city of London." The scheme proving abortive was abandoned, the offices in King William-street given up, and the secretary and officers discharged, but the Company had never been dissolved. The plaintiff, wishing to enforce his rights on the contracts, on the 25th of August, 1845, issued a writ of summons, directed to "Pilbrow's Atmospheric Railway and Canal Propulsion Company, now or late carrying on business in King William-street, in the city of London;" and his attorney applied to the solicitors of the Company, Messrs. White and Borrett, who, by the deed of settlement of the Company, had been appointed to transact and conduct all the proceedings in the courts of law for the Company, for an undertaking to appear. They, after time taken to consider, declined to accept service. It appeared that three of the directors only were in England, and upon one of these, Mr. Lambert, who had acted throughout as a director, and who was one of those who had caused the common seal of the Company to be affixed to the contracts, the writ was served, near Barnet, in the county of Middlesex, more than 200 yards from the city of London. A

In a writ of summons against a company completely registered under the 7 & 8 Vict. c. 110, it is irregular to describe their supposed address as "now or late carrying on business in" &c.

Service of a writ of summons against such company, described as of the city of London, on a director in the county of Middlesex, more than 200 yards from the border of the City of London:—*Held to be bad. Semble*, that a party on whom a writ is so served may apply to set aside the service.

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rule nisi having been obtained to set aside the writ and copy and the service thereof, or some and one of them, with costs,

Talfourd, Serjt., shewed cause (a).—The object of the 2 W. 4, c. 39, s. 1, was to identify the person intended to be sued with the writ: *Hill v. Harvey* (b). The statute directs “that in every such writ and copy thereof, the place, and county of the residence, or supposed residence, of the party, defendant, or wherein the defendant shall be, or shall be *supposed* to be, shall be mentioned; and every such writ may be served in the manner heretofore used in the county therein mentioned, or within 200 yards of the border thereof, and not elsewhere,” &c. The plaintiff has identified the defendants with the Company mentioned in the writ, and has given the supposed residence of the Company, by inserting in the writ their registered address. This, however, is not an objection that Mr. Lambert can take.

As to the service, the 7 & 8 Vict. c. 110, sect. 25, enacts that on complete registration of any company it shall be incorporated by the name of the company set forth in the deed of settlement, for the purpose of suing and being sued; but it is silent as to the service of process, which is governed by the 8 & 9 Vict. c. 16, s. 135 (c), and the plaintiff has adopted the only course practicable. [*Wilde*, C. J.—You ought to go to the offices of the Company; and if there is no one there on whom to serve the writ, you might obtain a *distringas*.] The Company has no office; and it

(a) Before *Wilde*, C. J., *Coltman*, J., *Maule*, J., and *Williams*, J.

(b) 2 C., M., & R. 307; 5 Tyr. 971; 4 Dowl. P. C. 163.

(c) Which enacts, that “any summons or notice, or any writ or other proceeding at law or in equity, requiring to be served upon the Company, may be served

by the same being left at or transmitted through the post, directed to the principal office of the Company, or one of their principal offices, where there shall be more than one, or being given personally to the secretary, or in case there be no secretary, then by being given to any one director of the Company.”

is impossible for the plaintiff to make the usual affidavit that the Company are keeping out of the way for the purpose of avoiding process. [*Coltman*, J.—All that section 3 of 2 Will. 4, c. 39, requires is, that you should make it appear that the Company cannot be compelled to appear without some more efficacious process.] That section does not apply to a corporation. *Evans v. The Dublin and Drogheda Railway Company* (a) does not apply. He also referred to *Welsh v. Langford* (b).

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Channell, Serjt. (*Bovill* with him), in support of the rule.—First, the description of the residence is ambiguous, being in the alternative, and is therefore bad. If the present residence of a defendant be unknown, the proper course is to give the last known place of abode, as was done in *Norman v. Winter* (c). Mr. Lambert, being served with the writ, may take this objection; *Stevenson v. Thorne* (d). Secondly, the service is bad, for two reasons: one, that the service is on an individual member of the Company, who does not represent it; and the other, that it is served in the county of Middlesex, and more than 200 yards from the border of the city of London.

WILDE, C. J.—There is much embarrassment in this case, arising from the imperfect manner in which provision has been made for suing a body like this. The questions for our decision are, first, whether the particular description, “now or late carrying on business in King William-street, in the city of London,” renders the writ bad; and, secondly, whether the service in Middlesex of a writ so describing the Company was not irregular. Now, the description in the writ is certainly ambiguous, and contains no direct affirmation of the residence or address of the

(a) 14 M. & W. 142; 2 D. & L. 865; ante, Vol. 3, p. 760.

(b) 2 Dowl., P. C., 498.

(c) 5 Bing., N. C., 279; 7 Scott, 251; 7 Dowl. 304.

(d) 13 M. & W. 149.

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Company, which the statute seems to require. The words "now or late" leave it wholly uncertain where the real residence is; and it is consistent with this that the plaintiff knew what the right address of the Company was. If the plaintiff meant to treat the defendants as resident at Barnet, he should have positively described it in that manner. It appears to me that the writ does not conform to practice by reason of this ambiguity, and is therefore bad. Then as to the service; the Uniformity of Process Act directs the residence, or supposed residence, of the defendant to be stated in some county, and that the writ shall be there served, or within 200 yards of the border. A service in another county, unless within such bounds, will not suffice. It appears to me, therefore, that both the objections must prevail. It is urged that the plaintiff is in a difficulty; but because the Court cannot point out the mode of effecting service of the writ, we cannot support that which is clearly irregular. It is sufficient that the two objections urged are good.

COLTMAN, J.—If this were the case of an ordinary person, the description, "now or late," of a particular place would undoubtedly be insufficient. It is necessary that the writ should state the present actual or supposed residence of the party sued; and I do not see that the circumstances have dispensed with that. The act for the uniformity of process is also express upon the point, that the writ must be served in the county in which the residence of the party is stated to be, or within 200 yards thereof. The two objections are therefore fatal, and the rule must be made absolute.

MAULE, J., and WILLIAMS, J., concurred.

Rule absolute.

1846.

IN THE EXCHEQUER.

Michaelmas Term, 1846.

BOUSFIELD v. WILSON.

Nov. 28.

ASSUMPSIT for money had and received, and on an account stated. Plea as to 94*l.* 2*s.* 6*d.*, parcel &c., that after the passing of the 7 & 8 Vict. c. 110, intituled "An Act for the Registration, Incorporation, and Regulation of Joint Stock Companies," and after the 1st of November, 1844, to wit, on &c., the defendant, as the broker and agent of the plaintiff, sold, on account of the plaintiff, fifteen scrip shares of and in a certain joint stock company, called The Boston, Newark, and Sheffield Railway Company, for the sum of 94*l.* 2*s.* 6*d.*; the formation of which said Company was commenced after the 1st of November, 1844, and which at the time of such sale was a joint stock company, established in England for profit; and then was, and still is, a joint stock company according to the definition and within the provisions and true intent and meaning of the said act of Parliament, (that is to say), a partnership whereof the capital was then agreed and intended to be divided into shares, and so as to be transferable without the express consent of all the co-partners

Assumpsit for money had and received. Plea as to 94*l.* 2*s.* 6*d.*, that, after the passing of 7 & 8 Vict. c. 110, defendant, as the broker of the plaintiff, sold on his account fifteen shares in the Boston &c. Railway Company, for 94*l.* 2*s.* 6*d.*, which Company was a joint-stock Company within the provisions of the said act, that is to say, a partnership whereof the capital was agreed and intended to be divided into shares, &c., and not being a banking com-

pany, &c., (negating the excepted cases in the enacting part of sect. 2 of the statute), and that the said sum was money received by the defendant for the plaintiff, as the proceeds of such sale; that, at the time of such sale, the said Company had not been completely registered, and that no act of Parliament had been obtained on behalf of the said Company.

Held, that such plea was bad, for not shewing that the Company was a Company formed for the execution of works which could be carried into execution without the authority of Parliament, and not within the proviso of the second section.

Semble, that if the sale were illegal, the defendant could not set up that defence to this action.

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therein, and not then being a banking company, school, or scientific or literary institution, or a friendly society, loan society, or a benefit building society, nor a company incorporated by statute or charter, nor a company authorised by statute or letters patent to sue and be sued in the name of some officer or person; that the sum of 94*l.* 2*s.* 6*d.*, parcel &c. was so much money received by the defendant for the plaintiff, and at his request, for and as the price and proceeds of the sale by the defendant of such last-mentioned shares, or such sales thereof as aforesaid, and not otherwise or on any other account whatsoever; that at the time of such sale and when the said sum of 94*l.* 2*s.* 6*d.*, parcel &c. was so received by the defendant as aforesaid, the said joint stock Company had not been completely registered, nor had obtained any certificate of complete registration according to the provisions of the said act in that behalf, and that no authority or act of Parliament had then been obtained by or on behalf of the said Company for the carrying into execution of any work or works by the said Company, or in any wise relating to or authorising the said Company; of all which provisions the plaintiff at the time of the said sale, and when the said sum of 94*l.* 2*s.* 6*d.*, parcel &c., was so received by the defendant as aforesaid, had notice; which said sale was and is contrary to the form of the said act of Parliament so made and passed as aforesaid. Verification.

Demurrer.—Cause of demurrer (inter alia), that it appears upon the face of the plea, that the joint stock Company therein mentioned was a railway company for making a railway, which could not be carried into execution without obtaining the authority of Parliament; and, consequently, that the sale of the scrip thereof before complete registration, or before any act of Parliament for authorising the execution of the works of the said Company had been obtained, was not prohibited or rendered

illegal by the act of Parliament in the said plea mentioned(a).

Joinder in demurrer.

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Hayes, in support of the demurrer (b).—The plea is bad, for the reasons assigned. *Lawton v. Hickman* (c), and *Young v. Smith* (d) have decided that the sale of scrip of a railway company which cannot be carried into execution without the authority of Parliament, is not, before complete registration, prohibited by the 7 & 8 Vict. c. 110. But, even if the contract be illegal, the defendant, who has received the purchase-money, cannot raise that question, the purchaser not having set it up. *Tenant v. Elliott* (e), *Farmer v. Russell* (f).

(a) Sect. 2 of the 7 & 8 Vict. c. 110, enacts, "That this act shall apply to every joint stock company as hereinafter defined, established in any part of the United Kingdom of Great Britain and Ireland, except Scotland, or established in Scotland, and having an office or place of business in any other part of the United Kingdom for any commercial purpose, or for any purpose of profit, or for the purpose of assurance or insurance (except banking companies, schools, &c.). Provided nevertheless, that, except as hereinafter specially provided, this act shall not extend to any company for executing any bridge, road, &c., which cannot be carried into execution without obtaining the authority of Parliament."

Sect. 26 enacts: "And further, with regard to subscribers, and every person entitled, or claiming to be entitled to any share

in any joint stock company, the formation of which shall be commenced after the 1st of November, 1844, that, until such joint stock company shall have obtained a certificate of complete registration, and until any such subscriber or person shall have been duly registered as a shareholder in the said registry office, it shall not be lawful for such person to dispose, by sale or mortgage, of such share, or of any interest therein; and that every contract for, or sale or disposal of, such share or interest, shall be void; and that every person entering into such contract shall forfeit a sum not exceeding 10*l.*," &c.

(b) Before *Alderson*, B., *Rolfe*, B., and *Platt*, B.

(c) Q. B.; reported 16 Law J., Rep., N. S., Q. B. 20.

(d) 15 M. & W. 121.

(e) 1 Bos. & Pul. 3.

(f) Id. 296.

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Cowling, in support of the plea.—The authority of *Young v. Smith* and *Lawton v. Hickman* is not disputed; but it does not appear by the plea that the Company was a railway company requiring the assistance of Parliament: it is merely *called* a railway company; and if it be one requiring the assistance of Parliament, that ought to be replied. The clause at the end of the 2nd section is not an exception, but a proviso, it ought not, therefore, to be negatived by the plea, but ought to be replied by the plaintiff. *Simpson v. Ready* (a). [*Alderson*, B.—Every word of this plea may be true, and yet it may be a legal company. You ought to show an illegal company, which, under particular circumstances, might be made legal, and then the plaintiff might reply those circumstances.] If that be so, the party must always negative the proviso. [*Alderson*, B.—This is, in truth, an exception, though called a proviso. *Simpson v. Ready* is a different case.]

Then, as to the other point. This is a case of an implied promise, and the law will not imply a promise out of an illegal transaction of this sort. If it will imply such an obligation, it will be giving effect to an illegal transaction. *In pari delicto potior est conditio defendentis*, is a maxim applicable to this case. He also cited *Cannan v. Bryce* (b), and *Webb v. Brooke* (c). The policy of the law is to invalidate such a contract as this throughout. [*Alderson*, B.—It is not the policy of the law that he who has another man's money should keep it. In *Simpson v. Ready* there was a general prohibition on all town-councillors to make contracts with the council, but only certain persons were to sue for penalties. A. sues for the penalty; *prima facie*, he is entitled to do so, and it is for the defendant to shew that he is not. In this case, only certain joint stock companies are illegal; and it is therefore for the defendant, who pleads

(a) 12 M. & W. 736.

(b) 3 B. & Ald. 179.

(c) 3 Taunt. 4.

the illegality, to shew that it is a non-parliamentary railway, and within the prohibition of the act.]

Hayes replied.

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ALDERSON, B.—The plaintiff is entitled to our judgment. It is the 26th section of the 7 & 8 Vict. c. 110, which creates the illegality, and not the 2nd section. The 26th section says that, with regard to subscribers entitled to any share in any joint stock company, the formation of which shall be commenced after the 1st of November, 1844, that, until such company shall have obtained a certificate of complete registration, it shall not be lawful for such person to dispose by sale, or mortgage, of such shares, and that every such contract shall be void. Then, looking at the 2nd section, and taking it together with the 26th, the effect is, that the companies mentioned in the proviso of the 2nd section are not within the prohibition of the 26th. The clause at the end of the 2nd section is an exception, and not a proviso, and the defendant therefore ought, in his plea, to have negatived the fact of this Company being a company requiring the assistance of Parliament. *Primâ facie*, railway companies are not within the scope of the act. This case is clearly within the authority of *Young v. Smith* (a). Suppose the statute had said that the regulations as to complete registration should apply to all joint stock companies, not being railway companies, requiring the assistance of Parliament, surely it would be necessary for the defendant to state that this was not such a company. As to the other point, I do not entertain much difficulty about it; but upon that it is unnecessary to express any opinion.

ROLFE, B., and PLATT, B., concurred.

Judgment for the plaintiff.

(a) 15 M. & W. 121.

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IN THE COMMON PLEAS.

*Hilary Term, 1846.**June 6th.*

BOWLBY v. BELL.

The defendant authorised the plaintiff, a broker, to sell certain shares in a railway, then lying at the Company's office for registration. The plaintiff sold them to R. Some correspondence took place between the plaintiff and defendant on account of some delay in the transfer of the shares, and ultimately the defendant wrote a letter to the plaintiff requesting that all further communication should be made to his attorney. The transfer not having been made, R., after giving the plaintiff notice, bought the same number of shares at an advance in price, and charged the plaintiff with the difference, which the plaintiff paid and then sued the defendant for the amount.

ASSUMPSIT for money paid, money lent, interest and money due upon an account stated.

Plea, non assumpsit.

This cause was tried at the last Spring Assizes for the county of York, before *Coleridge, J.*, when the following facts appeared. That the plaintiff was a stockbroker, carrying on business at Hull, and the defendant was a merchant. In July, 1845, the plaintiff, on behalf of the defendant, and as his broker, agreed to sell to one Richardson, a stockbroker, five shares in the Great Grimsby and Sheffield Railway Company, at 4*l.* 15*s.* per share, but the name of the defendant was not mentioned at the time of the sale. The shares were, at the time of the contract of sale, at the Company's office in the course of registration, having been called in by the Company pursuant to their act, 8 & 9 Vict. c. 50, for the purpose of registration. The mode of transfer of shares is regulated by the 8 & 9 Vict. c. 16, s. 14 (a), and can only be by deed.

Held, first, that the plaintiff was authorised to sell registered shares only ; secondly, that, inasmuch as no valid transfer could be made except by deed under the 8 & 9 Vict. c. 16, s. 14, R. was bound to have tendered a deed of transfer before he could have recovered against the plaintiff, and not having done so, the plaintiff made the payment to him in his own wrong ; thirdly, that the above-mentioned letter did not amount to a refusal to complete the contract so as to dispense with a tender of a deed of transfer.

(a) Which enacts, "And with respect to the transfer or transmission of shares it is enacted as follows : Subject to the regula-

The sale not having been completed, the following correspondence took place between the parties.

Upon the 11th of August, 1845, the plaintiff wrote to the defendant—

“The broker to whom I sold five Grimsby and Sheffield shares has just called to say, that unless they are delivered to him on Wednesday or Thursday next, he shall buy them in against me at present prices, he being bound to deliver himself. If it be possible, it must be avoided. I would, therefore, suggest that you write at once to the office, requesting them to return the above to me; telling them, at the same time, the situation in which I am placed owing to the above shares being sent to register too early. There was no occasion to have sent them before the 16th instant; it is to be regretted that you have done so. Your clerk informs me you sent them on the 16th ult.”

On the 15th of August, the defendant replied, that “the purchaser will have everything fairly done to him as soon as the shares are registered.”

The plaintiff, on the 16th of August, again wrote to the defendant, saying—“Nothing can be done with respect to the Grimsby and Sheffield shares. Mr. Richardson, the broker to whom I sold them, must either accept them as transferable stock, or not at all. It was distinctly understood at the time the bargain was concluded, that the shares were then being registered; and it is anything but fair on the part of that gentleman to call upon me at the eleventh hour to deliver them as unregistered stock, when,

tions herein or in the special act contained, every shareholder may sell and transfer all or any of his shares in the undertaking, or all or any part of his interest in the capital stock of the company, in case such shares shall, under the provisions hereinafter contained,

be consolidated into capital stock, and every such transfer shall be by deed duly stamped, in which the consideration shall be truly stated; and such deed may be according to the form in the schedule (B.) to this Act annexed or to the like effect.”

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at the same time, he knew it was impossible to do so. I much admire the honourable feeling contained in your letter, and trust that this unpleasant affair will terminate better than you at present anticipate."

The defendant, on the 23rd of August, wrote to the plaintiff:—"Am I to understand that the bargain for the Grimsby and Sheffield shares is void, or that the party takes them, paying 4½, and 2l. 10s. for first call, and pays the moment delivery is made?"

The plaintiff replied on the 25th of August:—"The buyer of your Grimsbys will pay the call and the expenses of transfer when the proper time arrives for doing so."

Upon the 26th of August, the defendant wrote to the plaintiff:—"Inclosed I beg to hand you the notice of call on the five Grimsby shares, which the buyer can please pay immediately, and transmit either direct, or through my clerk, as I am desirous of having the business closed as quick as possible."

The plaintiff replied by letter on the 27th of August:—"The buyer of your five Grimsbys will pay the call on or before the 23rd of September next; until which period the shares cannot be transferred (see the secretary's letter inclosed); for the purpose of enabling the purchaser to do so, I retain the letter, advising you of the call in question."

The defendant having agreed to pay the call, signed the following document, which was put in evidence:—

"Mr. George Bowlby,—On or before the 23rd instant I undertake to pay a call of 2l. 5s. per share on five Grimsby and Sheffield shares, sold by you on my account on the 28th of July last, and as soon after as possible pledge myself to execute the necessary transfer in respect thereof. The amount to be repaid.

"1st September, 1845.

"T. F. BELL."

The defendant paid the call upon the 23rd of September;

nothing further appeared to have occurred until the 15th of October, when the defendant wrote to the plaintiff—
 “As I am going out of town, I have placed the correspondence with you relating to the Grimsby shares, in the hand of Mr. Walker, (his attorney,) to whom I beg all further communications may be made.”

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Richardson not being able to get the shares, on the 17th of October gave notice to the plaintiff, which was communicated to the defendant, that he would, on the 21st, buy in five shares in the Great Grimsby and Sheffield Railway Company, unless furnished with them in the interim by the plaintiff; and, accordingly, on the 23rd, Richardson, bought the five shares at an advance on the original contract price of 8*l.* 10*s.*; and, on the 7th of November, the plaintiff, against the express directions of the defendant, paid Richardson that sum, and brought the present action to recover the amount from the defendant. There was no proof that Richardson had ever tendered a deed of transfer of the shares to the plaintiff for execution, conformably with the 8 & 9 Vict. c. 110, s. 14, or the purchase-money, or call.

Upon these facts the learned judge directed a verdict for the plaintiff for 8*l.* 10*s.*, reserving leave to the defendant to move to enter a nonsuit, if the Court should be of opinion, either that the plaintiff had no claim against the defendant, no deed of transfer having been tendered, or that the payment was voluntary on the plaintiff's part, or that the plaintiff ought to have declared specially.

A rule nisi having been obtained by *Channell*, Serjt.,

Byles, Serjt., (with whom was *Archbold*), shewed cause (a).
 —The defendant, as principal, would have been liable to

(a) Before *Tindal*, C. J., *Coltman*, J., and *Maule*, J.

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Richardson as soon as his name was disclosed, *Thompson v. Davenport* (a); and being so, the plaintiff, as his agent having been compelled to discharge that liability, is entitled to be saved harmless by the defendant, and may recover the money paid to Richardson in this form of action; he was not bound to wait until sued by Richardson before payment of the difference: *Pitt v. Purssord* (b), *Kemp v. Finden* (c). [*Maule, J.*—No; if he had, he would not have been able to recover his costs.] As to the point of tender of a transfer, the plaintiff was not bound to oblige Richardson to go through the form of tendering a transfer, but if he was, the correspondence shews a waiver of that. It was not in the power of the plaintiff to transfer, not having the shares. He also cited *Child v. Morley* (d) and *Lightfoot v. Creed* (e). As to the memorandum of the 1st of September requiring a stamp, this is a mere authority, and need not be stamped: *Humble v. Mitchell* (f), *Latham v. Rutley* (g), *Chadwick v. Sills* (h).

Channell, Serjt., (*Atherton* with him), in support of the rule.—This is a case of broker and principal, and not that of principal and surety, and *Child v. Morley* (i) is an express authority in the defendant's favour. It is admitted, that the plaintiff need not have waited until action brought before he paid Richardson, but there must be an express authority by the defendant to the plaintiff to pay, or an implied one arising from a legal liability; an express authority it is not pretended that there is, nor is there an implied authority, for there was no legal liability on the plaintiff's part to pay, he was a mere volunteer. The transfer

(a) 9 B. & C. 78; 4 M. & R. 110.

(b) 8 Mee. & W. 538.

(c) 12 Mee. & W. 421.

(d) 8 T. R. 610.

(e) 8 Taunt. 268.

(f) 11 Ad. & Ell. 205.

(g) R. & M. 13.

(h) Ib. 15.

(i) 8 T. R. 610.

by the 8 & 9 Vict. c. 16, s. 14, must be by deed, and this being a sale of registered shares, a tender of a deed ought to have been made by Richardson to the defendant before any liability could have attached on him, or a duty to pay arise, *Stephens v. De Medina* (a); that not having been done, Richardson could not have recovered against the plaintiff or defendant, and therefore the payment by the plaintiff to Richardson was voluntary. There is no pretence for saying that the tender has been dispensed with.

Cur. adv. vult.

TINDAL, C. J., delivered the judgment of the Court.— In order to maintain this action for money paid, it was necessary that the plaintiff should prove either an actual request to pay on the part of the defendant, or that the money was paid in discharge of some liability, which the plaintiff had taken upon himself by the defendant's authority. No evidence was given of an actual request; it is, therefore, necessary to inquire whether the plaintiff paid in discharge of any legal liability, incurred by the defendant's authority. The precise nature of the contract which was entered into by the defendant was not proved, but the evidence given by Richardson tends to shew that the contract was for registered shares. He says, "The shares were in for registration at the time I purchased. It was understood at the time of the bargain between the plaintiff and me, that the shares were then being registered." If the contract was for unregistered shares, it may be collected from the correspondence that the defendant did not authorise the plaintiff to make such a contract; and if he did make such a contract, and thereby incurred a liability to have shares bought in against him, he cannot charge the defendant with the loss sustained. Again, whatever was the form of

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(a) 4 Q. B. Rep. 422.

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the contract, it must be taken, against the plaintiff, that the purchaser agreed that it should be treated as a contract for registered shares, for, in answer to the defendant's letter of the 23rd of August, inquiring whether the contract was to be treated as void, the plaintiff answered on the 27th, that Richardson would pay the contract price, and the amount of the call, which had then been made, and which it would be necessary to pay, in order to have a transfer of the shares after registration. The defendant thereupon paid the call, and then nothing remained to be done but the execution of a transfer, which Richardson ought to have prepared and tendered for execution, together with the purchase-money; and until he did so, he would not be in a situation to maintain an action for not transferring the shares, according to the case of *Stephens v. De Medina* (a).

No evidence was given of any further communication between the parties until the 15th of October, when the defendant wrote to the plaintiff, saying, that as he was going from home, he had placed the correspondence in the hands of his attorney, and requesting that all future communications might be made to him. This, it was said, amounted to a refusal to complete the contract, and dispensed with the tender of a transfer; but we think that such meaning cannot be attributed to it. And although the plaintiff, by paying the difference when the shares had been bought in by Richardson, as far as he was concerned, waived such tender, we think he clearly had no authority to do so after the defendant's letter, expressly desiring him not to pay any money on his account.

Upon the whole, then, it appears to us that if the contract was for unregistered shares, the plaintiff was not authorised to make it; and if for registered shares, Richardson, not having tendered a transfer, was not in a situation to proceed against the plaintiff, and consequently, that the

(a) 4 Q. B. Rep. 422.

payment by him was in his own wrong, and did not give him a right of action against the defendant for money paid to his use. The rule for entering a nonsuit must therefore be made absolute.

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Rule absolute.

IN THE COMMON PLEAS.

Michaelmas Term, 1846.

KENT v. GREAT WESTERN RAILWAY COMPANY.

Nov. 23rd.

ASSUMPSIT for money had and received. Plea (inter alia), that defendants had had no notice of action.

This was an action to recover the amount of certain alleged overcharges for the carriage of goods, the case being similar in its circumstances to that of *Parker v. The Great Western Railway Company* (a). The writ was indorsed with the sum of £650 for debt, and 2*l.* 5*s.* for costs. The Company were incorporated by the 5 & 6 Will. 4, c. cvii, the 167th section of which enacts "that it shall be lawful for the said Company, and they are hereby authorised, if they shall think proper, to use and employ locomotive engines or other moving power, and in carriages or in wagons drawn or propelled thereby, to convey upon the said railway all such goods, &c. as shall be offered to them for that purpose, and to make such reasonable charges for such

By the 5 & 6 W. 4, c. cvii, the Company were empowered to construct a railway, and to convey upon it such goods as should be offered to them for that purpose, and to make such reasonable charges as they might from time to time determine upon. By sect. 223 it was enacted that no action, &c. should be brought, &c. against any person for anything done in pursuance of

the act, or in the execution of the powers thereof, unless twenty days' previous notice, in writing, should be given to such person. By the 2 Vict. c. 27, s. 24, it was enacted that the charges by the said act authorised to be made should be charged equally to all persons:—*Held*, that the taking of toll by the Company was an act done in the execution of the powers of their act, and that, in assumpsit against them to recover the amount of certain overcharges, they were entitled to notice of action, for which, however, the plaintiff, having succeeded, was entitled to charge, although that charge was not included in the amount indorsed on the writ.

(a) Antè, vol. 3, p. 563; 7 M. & G. 253; 7 Scott, N. R., 835.

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conveyance as they may from time to time determine upon." The 2 Vict. c. xxvii, s. 24, enacts, "that the charges by the said act authorised to be made, &c. shall be at all times charged equally to all persons," &c. Sect. 223 of the 5 & 6 Will. 4, c. cvii, provides, "that no action, suit, or information, nor any other proceeding of what nature soever, shall be brought, commenced, or prosecuted against any person, for anything done or omitted to be done in pursuance of this act, or in the execution of the powers or authorities, or any of the orders made, given, or directed, in, by, or under this act, unless twenty days' previous notice, in writing, shall be given by the party intending to commence and prosecute such action, suit, information, or other proceeding to the intended defendant." Before the commencement of the action, the plaintiff gave to the defendants a notice of action of a very special kind. Upon the trial of the cause, before *Tindal*, C. J., the plaintiff had a verdict for £681, and on the taxation of costs before the Master, he claimed a sum of 178*l.* 15*s.* in respect of the notice of action and service thereof. The defendants resisted this claim "on the ground that, as the writ was the foundation of the action, and the costs thereon indorsed were 2*l.* 5*s.* only, the plaintiff was concluded thereby, and that the Master had no power to allow to the plaintiff any charges for preliminary proceedings in stating his claim." The Master however allowed a sum of 133*l.* 12*s.* 2*d.* in respect of this charge. A rule nisi having been obtained by *Channell*, Serjt., calling upon the plaintiff to shew cause why the Master should not review his taxation,

Talfourd, Serjt., and *J. Brown*, shewed cause (a).—A notice of action in this case was necessary. The power to take tolls is given to the Company by sects. 164 and 166 of the 5 & 6 Will. 4, c. cvii, and the 2 Vict. c. xxvii, sect. 24, equalizes the amount of tolls to be taken. The act complained of, therefore, being the taking an excess in the

(a) Before *Wilde*, C. J., *Maule*, J., *Coltman*, J., and *F. Williams*, J.

amount of tolls, was an act done in the execution of the powers of the act, and notice of action was necessary. The form of the action is immaterial: *Willett v. Tidey* (a), *Waterhouse v. Keen* (b), *Smith v. Shaw* (c), *Sellick v. Smith* (d), *Greenway v. Hurd* (e), *Boyd v. The Croydon Railway Company* (f), *Pickford v. The Grand Junction Railway Company* (g). The cases of *Palmer v. The Grand Junction Railway Company* (h), and *Carpue v. The Brighton Railway Company* (i), do not apply, because in those cases the defendants were not charged for anything done under the powers of their acts, but for negligence. As to the indorsement on the writ, the plaintiff is not bound by that after the defendants have chosen to contest the claim: *Jacquot v. Boura* (k), *Bowdidge v. Slaney* (l); and as to the reasonableness of the charge, this Court will not inquire into that, as the quantum was not objected to before the Master, but merely the liability. They also referred to *Morgan v. Palmer* (m), *Umphelby v. M'Lean* (n), *Charrington v. Johnson* (o), *The Stockton, &c. Railway Company v. Barrett* (p).

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Channell, Serjt., and *Keating*, in support of the rule.—No notice of action was necessary, for the wrong complained of, was not done in the execution of the act. The defendants are, in truth, carriers on their own line, are sued in that character, and require no act of Parliament to enable them to act as such. This case is not distinguishable in principle from *Palmer v. The Grand Junction Railway Company*, and

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| (a) 1 Show. 214. | B. Rep. 747. |
| (b) 4 B. & C. 200. | (k) 5 M. & W. 155; 7 Dowl. |
| (c) 10 B. & C. 277; 5 M. & R. 225. | 331. |
| (d) 11 B. M. 459. | (l) 2 Bing., N. C., 142; 2 Scott, N. R., 197. |
| (e) 4 Term Rep. 553. | (m) 2 B. & C. 729. |
| (f) 4 Bing. N. C. 669. | (n) 1 B. & Ald. 42. |
| (g) 8 M. & W. 372; antè, vol. 3, p. 193. | (o) 13 M. & W. 856. |
| (h) 4 M. & W. 749. | (p) Antè, vol. 2, p. 443; 7 M. & G. 870; 8 Scott, N. R., 641. |
| (i) Antè, vol. 3, p. 692; 5 Q. | |

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Carpue v. The Brighton Railway Company (a). But if notice of action were necessary, the plaintiff is not entitled to charge for it; it is no part of the proceedings in the action, but preliminary to them. This view is borne out by Rule 11, Hil. Term, 2 Will. 4, which requires that the plaintiff's attorney should indorse on the writ, the amount that he claims for such writ, copy and service, and attendance to receive the debt and costs, and the plaintiff is entitled to stay proceedings on payment of the sum demanded. Costs antecedent to the issuing the writ are neither costs in the cause nor of the writ. [*Maule, J.*—The costs of the writ, perhaps, would include these; for the act says, no writ shall be sued out before the notice shall have been given. The Statute of Gloucester gives to the party the costs of "his writ purchased," which would include them.] At any rate, the amount allowed is unreasonable; and though not distinctly raised before the Master, may now be insisted on here. [*Wilde, C. J.*—I do not think that objection is open to you. I have always understood the rule to be, that the objection insisted on should be taken before the Master.]

COLTMAN, J. (*b*).—I think this case is distinguishable from *Palmer v. The Grand Junction Railway Company (c)*. That was an action against the Company for negligence in the mode of conveying some horses, and the act complained of was in no respect a matter done under the authority of the statute; here, however, the action is for taking toll in a manner or to an amount, contrary to that authorised by the act, which is done under that authority; and in an action for any irregularity in the mode of imposing the toll, a notice seems to me to be a necessary condition precedent. Then, the question raised before the Master was, not as to the quantum of the charge, but as to whether the notice was re-

(a) 5 Q. B. Rep. 747.

took no part in the judgment.

(b) *Wilde, C. J.*, having been engaged in the cause as counsel

(c) 4 M. & W. 749.

quisite. I think that the plaintiff was bound to give the notice, and that he is entitled to the cost of it.

MAULE, J.—I am of the same opinion. This is a case which appears to me to fall within the provisions of the act, in which notice is a necessary preliminary to any action. That act enables the Company to carry goods, charging a certain sum for their conveyance, and only a certain sum. Here the parties, then, are trying, in the form of an action of assumpsit, the question, whether the Company are entitled, under that act, to charge more than they have charged other carriers, or whether they are not bound to carry for all customers, at the same rate. This is, then, an action for something done under the powers of the act which it did not justify, but which the defendants thought it justified, and consequently notice of action was necessary. It has, however, been urged, that the plaintiff cannot recover these costs, because the rule of court requiring the indorsement of the costs on every writ does not appear to include such a charge. That rule provides, that, upon every writ for the payment of any debt, the amount of which the plaintiff's attorney claims for the costs of such writ shall be indorsed upon it, and that upon payment thereof within four days further proceedings will be stayed. Afterwards this act passes, which says, that the plaintiff should be barred from suing out his writ without given notice. The party cannot, I think, under those circumstances, say that the proceedings should be stayed without paying the costs of that notice. The question as to the amount was entirely a matter for the Master's determination. It has been urged that the notice was somewhat longer than it ought to have been. The point, however, was not taken before the Master; and as he might have disallowed a part, had that objection been made, we cannot say that he has done wrong, and remit the matter back to him.

V. WILLIAMS, J., concurred.

Rule discharged.

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IN THE QUEEN'S BENCH.

Hilary Term, 1846.

Jan. 11th.

COOKE v. TONKIN.

The plaintiff having, by order of the solicitor, advertised the prospectuses of a projected Railway Company, and supplied them with newspapers, brought his action of debt against one of the provisional committee.

The jury having found a verdict for the plaintiff:—*Held*, that there was no evidence that the person who employed the plaintiff had any authority, either express or implied, from the defendant to pledge his credit.

THIS was an action of debt for inserting, printing and publishing advertisements in certain newspapers by the plaintiff, for goods sold, and for money due upon an account stated.

Plea, never indebted.

The cause was tried before the Under-sheriff of Middlesex, when it appeared that the plaintiff was the proprietor of the *Oxford Chronicle*, and the defendant was one of the provisional committee of “The Oxford, Thame, High Wycomb and Oxford Junction Railway.” The defendant had been put upon the provisional committee, with his consent, in October, 1845, and had in that month attended two meetings as provisional committee-man, though he never applied for or took any shares. The action was for advertising the prospectus of the Company, in the plaintiff’s newspaper, and for supplying the newspapers of the plaintiff to the Company, which was done by the direction of the solicitor of the Company, in the month of November, 1845. In the prospectus advertised, was a clause stating that the affairs of the Company would, until their act should be obtained, be under the direction of a committee of management, and that such committee had been appointed on the 10th of October, but their names were not given.

At the trial it was contended, on behalf of the defendant, that credit must have been given either to the committee of

management, or to the solicitor of the Company, but that there was no evidence to charge the defendant, who was merely a member of the provisional committee, with this claim, as there was no proof that he attended any meeting connected with the ordering of the advertisements or the newspapers. The jury, however, found a verdict for the plaintiff.

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A rule *nisi* having been obtained by *Phinn* for a new trial, on the ground that there was no evidence for the jury,

Maynard shewed cause.—The solicitor was the agent of the Company, and to them the credit was given, and not to the solicitor. *Robins v. Bridge* (a), *Hartop v. Jukes* (b), *Scrace v. Whittington* (c), *Downman v. Jones* (d). The managing committee are the agent of the entire body, and their acts bind the members individually. *Pitchford v. Davis* (e), *Bell v. Francis* (f). Therefore the prospectus, which says that the affairs of the Company would, until the act should be obtained, be under the direction of the committee of management, does not affect the defendant's liability. It was proved that the defendant acted as provisional committee-man before the debt was incurred, and this distinguishes the case from *Barnett v. Lambert* (g), *Wylde v. Hopkins* (h), and *Reynell v. Lewis* (i). At any rate, there was some evidence for the jury which will support the verdict. The work done was necessary to the formation of the Company, and brings the case within the principle of

(a) 3 M. & W. 114.

(b) 2 M. & Sel. 438.

(c) 2 B. & C. 11.

(d) 4 Q. B. 235 (n).

(e) 5 M. & W. 2.

(f) 9 Car. & P. 66.

(g) Antè, p. 308 ; S. C. 15 M. & W. 489.

(h) Antè, p. 359 ; S. C. 15 M. & W. 517.

(i) Antè, p. 351 ; S. C. 15 M. & W. 517.

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Doubleday v. Muskett (a), Burls v. Smith (b), Glenester v. Hunter (c), Steigenberger v. Carr (d), Lake v. The Duke of Argyll (e).

Phinn, in support of the rule.—Though the defendant was a provisional committee-man, and acted as such twice before the cause of action arose, he never acted so as to render him liable to this demand, nor had the solicitor authority to pledge his credit. *Burrell v. Jones (f), Fox v. Clifton (g)*. Storey on Agency, p. 81, s. 106. It is no part of the duty of a solicitor to a company to advertise it. The defendant as provisional committee-man was a mere patron of the undertaking, and in no way liable for the debts of the Company, as it was not shewn that he was to share in the profit and loss of the undertaking. It is not clear what are the duties of a provisional committee-man; the 7 & 8 Vict. c. 110 does not define them. *Bell v. Francis (h)* does not apply, nor does *Todd v. Emly (i)*, because there was no evidence here, that the managing committee had any authority to pledge the credit of the provisional committee.

Cur. adv. vult.

DENMAN, C. J.—A rule was obtained for a new trial in this case, in which the sheriff had submitted to the jury proof that the defendant was a provisional committee-man of an intended railway company, and that the plaintiff had executed orders, for advertising some matters relating to it, upon which evidence a verdict had been found for the plaintiff. This evidence was said to be entirely insufficient

(a) 7 Bing. 110.
 (b) Id. 705.
 (c) 5 Car. & P. 62.
 (d) 3 Man. & Gr. 191; 3 Scott,
 N. R., 466.

(e) 6 Q. B. Rep. 477.
 (f) 3 B. & Ald. 47.
 (g) 6 Bing. 776.
 (h) 9 Car. & P. 66.
 (i) 8 M. & W. 505.

to call for an answer, and we are of that opinion. The orders had come from a gentleman who held the office of solicitor to the Company; but it did not appear on whose account he had ordered them, or that he had any authority to order them, either from the defendant personally, or from the provisional committee; nor was the work and labour supplied by the plaintiff for the execution of any duty belonging to the gentleman who gave the orders, as the solicitor to the Company; without inquiring into the validity of other objections made on the defendant's part at the trial we think ourselves bound to make this rule absolute, for want of any evidence that the person who employed the plaintiff had any authority, either express or implied, from the defendant to pledge his credit.

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Rule absolute.

IN THE EXCHEQUER.

Hilary Term, 1847.

PRICE and Another v. THE GREAT WESTERN RAILWAY COMPANY. Jan. 20th.

THIS was an action of covenant on five deed-polls or debentures of the Company. The defendants pleaded pay-
The Great Western Railway Company issued to the plaintiffs

debentures, in the following form:—"We, the Great Western Railway Company, in consideration of 1000*l.* to us paid by T. P. and W. G., do assign unto them the said undertaking, and all the estate, &c., to hold the same until the said sum of 1000*l.*, together with interest for the same after the rate of 5*l.* for every 100*l.* for a year, payable as hereinafter mentioned, shall be fully paid. And it is hereby stipulated that the said principal sum of 1000*l.* shall be payable and paid on the 15th of January, 1844, and that in the meantime the said Company shall, in respect of interest as aforesaid on the said principal sum, pay to the bearer of the coupons or interest warrants hereunto annexed, the several sums mentioned in such warrant respectively," &c. In January, 1844, the interest due on the bonds up to the 15th of January, 1844, was paid to the plaintiffs. The Company did not then pay, nor did the plaintiffs require, the principal, nor did the Company give to the plaintiffs notice that they were ready to pay it:—*Held*, that these debentures continued to carry interest from the 15th of January, 1844, until payment.

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ment into court of £5000. The following case was afterwards, by consent, stated for the opinion of this Court (a).

On the 30th of November, 1838, the above-mentioned Company issued certain debentures or deeds, of which the plaintiffs took to the amount of £5000, and had delivered five several deed-polls or debenture bonds, sealed with the corporate seal of the Company. The following is a copy of one of the deed-polls or debenture bonds:—

“ Great Western Railway Company. Debenture bond No. 5729 B., £1000. By virtue of an act of Parliament passed in the fifth and sixth years of the reign of his late Majesty King William the Fourth, intituled ‘ An Act for making a Railroad from Bristol to join the London and Birmingham Railway near London, to be called “ The Great Western Railway Company;” with Branches therefrom to the towns of Bradford and Trowbridge, in the county of Wilts; We, the Great Western Railway Company, incorporated by and under the said act, in consideration of the sum of £1000 to us in hand paid by Thomas Price, of Clementhorp, York, Esq., and William Gray the younger, of the city of York, solicitor, do assign, under the said Thomas Price and William Gray the younger, their executors, administrators, and assigns, the said undertaking, and all future calls on the proprietors of the said undertaking, and all and singular the estate, tolls, and sums of money arising by virtue of the said act, and all the estate, right, title, and interest of the said Company in and to the same, to hold unto the said Thomas Price and William Gray the younger, their executors, administrators, and assigns, until the said sum of £1000, together with interest for the same after the rate of £5 for every £100 for

(a) Before *Parks*, B., *Alderson*, B., *Rolfe*, B., and *Platt*, B.

a year, payable as hereinafter mentioned, shall be fully paid and satisfied. And it is hereby stipulated, that the said principal sum of £1000 shall be repayable and repaid on the 15th of January, which will be in the year 1844; and that, in the meantime, the said Company shall, in respect of interest, as aforesaid, on the said principal sum, pay to the bearer of the coupons or interest warrants hereunto annexed, the several sums mentioned in such warrant respectively, at the times specified therein. Given under our common seal this 30th day of November, 1838."

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The following is a copy of one of the coupons or interest warrants annexed to the last-mentioned deed-poll:—

" Great Western Railway Company. Debenture No. 18. Interest-warrant. — pounds, payable 15th July, 184 . Entered. This warrant will be paid on presentation at the London office, Princes-street, Bank."

Each of the other deed-polls or debenture bonds and coupons were for the same amount, and in the same form, with the exception of the number. The coupons were duly presented half-yearly as they became due, and the amount duly paid. In January, 1844, the last of the coupons was presented and the amount duly paid; but the Railway Company did not then pay the principal, nor apprise the plaintiffs, nor any other persons on their behalf, that it was ready to be paid, nor give any intimation whatever on the subject. No application was made to the Company, nor to any agent on their behalf, by the plaintiff, for payment of the amount of the said bonds, nor was there any refusal of the defendants to pay the amount thereof. No interest has been paid to the plaintiffs, nor were the principal sums mentioned in the respective deed-polls or debenture bonds, or any part thereof, paid to the plaintiffs

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before the commencement of this action. The defendants paid into court the principal monies on the several deed-polls or debenture bonds, amounting to £5000, under the plea of payment into court, denying their liability beyond that amount.

The question for the opinion of the Court is, whether the plaintiffs are entitled to recover in the action interest for the time which elapsed between the 15th of January, 1844, and the time when the defendants paid money into court, or for any portion of such time; and for the purposes of this case the Court is to have the same powers, if necessary, as a jury would have had. If the Court should be of opinion in the affirmative, the defendants are to withdraw their plea, and the plaintiffs to be entitled to sign judgment by confession for such amount and rate of interest as the Court shall think fit. If the Court shall be of a contrary opinion, then judgment as in the case of a nonsuit is to be entered.

Watson, for the plaintiff, was stopped by the Court, who called upon

Martin, for the defendants.—The plaintiffs are not entitled to interest on these debentures after the 15th of January, 1844. They must rest their claim either at common law or under the 3 & 4 Wm. 4, c. 42, s. 28. Now at common law no interest is due upon debts unless there be an express contract to pay it, or an implied one, arising from the circumstances, as on mercantile debts. There are conflicting dicta on this subject; but the correct rule is laid down in *Higgins v. Sargent* (a) by *Holroyd*, J., who says, “Unless interest be payable by the consent of the parties, express or implied, from the usage of trade (as in the case of bills of exchange), or other circumstances, it is not due

(a) 2 B. & C. 348.

at common law." After referring to the opinion of Lord Ellenborough, he says, "Independently of these authorities, I am of opinion, upon the principles of common law, that interest is not payable upon a sum certain, payable on a given day. The action of debt was the specific remedy appropriated by the common law for the recovery of a sum certain. Now in that action the defendant was summoned to render the debt, or shew cause why he should not do so. The payment of the debt satisfied the summons, and was an answer to the action. If this, therefore, had been an action of debt, the payment of the principal sum would have been a good defence, because the interest is no part of the debt, but is claimed only as damages, resulting from the non-payment of the debt." In this case the agreement is to pay interest up to a certain day; and applying the rule, that *expressum cessare facit tacitum*, the conclusion is that interest was not to be paid after that day. [*Parke, B.*—In covenant on a mortgage deed, whereby interest is payable up to a certain day, if the principal be not paid on that day, the mortgagee recovers interest beyond that time, he recovers it as damages; and in debt the pleader always lays as damages a sum sufficiently large to cover it. The deed shews the intention of the parties. The defendants have paid interest up to a certain day, and it is reasonable to infer that they intended to continue paying it.] The plaintiff could not in this case have recovered in debt for interest. This case is not distinguishable from *Higgins v. Sargeant*. [*Platt, B.*—The rule is stated by Lord Tenterden in *Page v. Newman* (a) to be, that interest is not due on money secured by a written instrument, unless it appears on its face that interest was intended to be paid, or unless it be implied from the usage of trade. *Parke, B.*—The deed shews that it was the intention of the parties that this should be a debt bearing

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(a) 9 B. & C. 378.

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interest. In *Higgins v. Sargent*, there was an express contract to pay interest up to a certain day.] Can the Court imply from that a contract to pay interest beyond that day? [*Parke*, B.—The jury give it as damages for the detention of the debt: it is not recoverable as interest on the contract. *Alderson*, B.—Surely, if money be employed on interest, it is but reasonable to suppose that it would continue to be so employed.] He referred to *Watkins v. Morgan* (a), *Atkinson v. Jones* (b), *Mounson v. Redshaw* (c), and *Dickenson v. Harrison* (d).

PARKE, B.—The plaintiffs are entitled to our judgment. This is substantially a mortgage, and the practice in such cases invariably is, to give interest by way of damages. If this were simply the case of a debenture payable on the 1st of January, we should have to consider whether, under the statute 3 & 4 Wm. 4, we as a jury should give interest; that would depend on what we should think of the party whose duty it was to move towards the payment of the money. If the defendants wish for the future not to pay interest, they must have the money ready at their banker's, and give notice to their creditors of their being ready to pay them; strictly, they must tender the money.

ALDERSON, B., ROLFE, B., and PLATT, B., concurred.

Judgment for the plaintiff.

(a) 6 Car. & P. 661.

(b) 2 Ad. & El. 439.

(c) 1 Saunder's Rep., by Wil-

liams, 201 a, note (r).

(d) 4 Price, 282.

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COURT OF QUEEN'S BENCH.

In Trinity Term, 1847.

WOOLMER and Six Others v. TOBY.

May 29.

ASSUMPSIT.—The declaration stated that whereas, before &c., to wit, on &c., the plaintiffs had agreed, together with divers, to wit, 150 other persons, to endeavour to form and establish a joint-stock Company, to be called “The Direct Exeter, Plymouth, and Devonport Railway Company,” for the purpose of forming, making, and constructing a railway from Exeter, Plymouth, and Devonport, for the conveyance of passengers and goods; and to endeavour to obtain an act of Parliament for that purpose, and which railway could not be made, constructed, or executed without the authority of Parliament; and the capital of which said proposed Company was to consist of £1,000,000, to be divided into 40,000 shares of £25 each, and upon which a deposit of 2*l.* 12*s.* 6*d.* for each share was to be paid, and which deposit was to be paid by such persons respectively as should apply for, and to whom the said shares respectively should be allotted by a committee of management of the said proposed Company. And whereas, before and at the

A projected Railway Company issued prospectuses, stating the proposed capital to be £1,000,000, in 40,000 shares of £25 each, and giving the names of the provisional directors, and the form of application for shares, which was to be made to the provisional committee of management. On the 7th of October the provisional committee passed resolutions, appointing a committee of management. On the 13th of October

the defendant applied in the form given by the prospectus for shares, and on the 15th of December he received a letter of allotment. The receipt in blank at the foot of the letter was “on account of the provisional committee.” Between the time of defendant’s application and the allotment to him there had been a change in the members of the provisional committee, by the withdrawal of some names and the substitution of others.

In an action by the committee of management to recover the amount of the deposits:—*Held*, that as the contract to take shares was made with the provisional committee, and not with the committee of management, the defendant was entitled to a nonsuit.

Quære.—Whether the change in the state of the Company between the application and allotment affected the contract?

Quære also.—Whether the proposal of the defendant was accepted under the circumstances in reasonable time?

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time of the defendant's applying for shares, and also at the time of the making of the defendant's promise as hereinafter mentioned, the plaintiffs formed and were the committee of management of the said proposed company; and whereas, before the making of defendant's promise, to wit, on the 15th of October, 1845, the defendant had applied to the plaintiffs, so being the committee of management, and requested them to allot to him fifty of the said shares in the said proposed Company, or such a less number as they might think fit to appropriate to him; and thereupon, heretofore, to wit, on the 15th December, in the year aforesaid, the plaintiffs, at the request of the defendant, allotted to him forty of the said shares in the said Company, upon certain terms then agreed upon by and between the plaintiffs and the defendant, (that is to say) that a deposit of 2*l*. 12*s*. 6*d*. upon each and every of such shares, making in the whole the sum of £105, should be paid by the defendant to one of certain bankers then appointed and agreed upon in that behalf, to wit, (A., B., &c.), on or before the 20th December, 1845; and that scrip certificates should be delivered by the said proposed Railway Company in exchange for a certain letter of allotment, by which the plaintiffs certified to the defendant the said allotment of the said shares, and the receipt at foot thereof, signed by one of the said bankers; and that notice should be given by the said Company, by advertisement or circular, of the times and places appointed for execution of the parliamentary deeds of the said Company, when the said scrip would be delivered; and thereupon, in consideration of the premises, and that the plaintiffs, at the defendant's request, to wit, on &c., promised him to fulfil the said terms on their part, the defendant then promised the plaintiffs to fulfil the said terms on his part; and, although the plaintiffs were always ready and willing to perform the said terms on their parts, and although the said 20th December elapsed after the said promise of the defendant, and before the commencement of this suit,

yet the defendant, disregarding his said promise, did not nor would, on or before the said 20th December, 1845, pay to any or either of the said bankers, or at all, the said deposit of 2*l.* 12*s.* 6*d.* per share, but omitted so to do. Damages, £300.

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Pleas:—1. Non-assumpsit. 2. That the plaintiffs had not agreed, together with the said other persons, to endeavour to form and establish the said joint-stock Company in the declaration mentioned, in manner and form, &c. 3. That the plaintiffs did not form nor were the committee of management of the said proposed Company, in manner and form, &c. 4. That the defendant did not apply to the plaintiffs, or request them to allot to him fifty of the said shares in the said proposed Company, or such a less number as they might think fit to appropriate to him; nor did the plaintiffs allot to him forty of the said shares in the said Company, upon the said term in the declaration mentioned; nor were the said terms agreed upon by and between the plaintiffs and the defendant, in manner and form, &c. 5. That the plaintiffs were not always ready and willing to perform the said terms on their parts, in manner and form, &c. 6. That plaintiffs caused defendant to make the said agreement and promise in the declaration mentioned, and defendant was induced to make the same through and by means of the fraud, covin, and misrepresentation of the plaintiffs and others in collusion with them.

The cause was tried before *Rolfe*, B., at the Exeter Spring Assizes, 1846, and the following prospectus given in evidence:—

“The Direct Exeter, Plymouth, and Devonport Railway Company, by Chudleigh, &c. Provisionally registered pursuant to 7 & 8 Vict. c. 110. Capital, £1,000,000, in 40,000 shares of £25 each. Deposit, 2*l.* 12*s.* 6*d.* per share. Provisional directors” [then followed several names,

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with power to add to their number. The prospectus concludes by stating that] “ applications for shares may be made through all respectable brokers, in the annexed form, to the solicitors of the Company and the secretary :—‘ To the provisional committee of management of the Direct Exeter, Plymouth, and Devonport Railway. I request you will allot to me shares of £25 each in the above railway ; and I undertake to accept the same, or such number as you may appropriate to me, subject to the regulations of the Company ; also to sign the necessary legal documents, and to pay, when required, the deposit of 2*l*. 12*s*. 6*d*. per share. Name in full ————. Profession (if any), and professional residence, in full ————. Residence in full ————. Date ————. Signature of applicant ————. Reference, with name and address of referee ————. Witness to applicant’s signature ————. Residence, &c. of witness ————.”

On the 13th of October, 1845, the defendant applied, in the form prescribed in the prospectus, for fifty shares. In answer to this application, the following letter of allotment was received by the defendant on the 15th of December :—

“ Direct Exeter, Plymouth, and Devonport Railway. Provisionally registered pursuant to 7 & 8 Vict. c. 110. Capital, £1,000,000, in 40,000 shares of £25 each. Deposit, 2*l*. 12*s*. 6*d*. per share. No. of letter, 635. No. of shares, 40. Deposit, £105—Sir, I am instructed to acquaint you that the committee have allotted you 40 shares in the above undertaking, on which a deposit of 2*l*. 12*s*. 6*d*. per share must be paid to one of the undermentioned bankers, on or before Saturday, the 20th day of December instant. The plans, sections, &c., have been duly deposited, and all the necessary notices published. Scrip certificates will be delivered in exchange for this letter and the receipt at the foot, signed by one of the bankers ; and notice will be

given, by advertisement or circular, of the time and places appointed for the execution of the parliamentary deeds, when the scrip will be delivered. I am, &c.

“ F. G. FARRANT, Sec. *pro tem*.”

(Names of bankers).

“ Dec. 1845.—Received, on account of the provisional committee of the Direct Exeter, Plymouth, and Devonport Railway Company, the sum of £ , to account for to them on demand.

“ £——.”

Certain resolutions were put in evidence at the trial, from which it appeared that, on the 7th of October, 1845, a part of the provisional committee was formed into a committee of management, by whom the business of the formation of the Company was conducted, and the seven plaintiffs (Woolmer being chairman) constituted this committee of management; that, between the 13th of October and the 15th of December, some names had been withdrawn from, and others added to, the provisional committee; that neither the provisional committee or the committee of management ever paid the deposit on the shares allotted to them, and that, although applications had been made for more than 45,000 shares, 36,460 only had ever been allotted. It also appeared that no allotment of shares had been made until after the committee were aware the project would not be proceeded with.

On the 31st of December the defendant received the following letter:—

“ Direct Exeter, Plymouth, and Devonport Railway.—
Sir, On the other side I transmit you a copy of resolutions, passed at a numerous meeting of the provisional committee, held at the Company's offices this day. I am also directed

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to acquaint you, that in consequence of a number of applicants having failed to pay their deposits, the committee are unable to proceed with the undertaking in the ensuing session of Parliament. The requisite plans, sections, and books of reference have been duly deposited, in compliance with the standing orders, and the expenses of these operations have now to be met. Those charges having been incurred in consequence of your and other applications for shares, the committee feel that you will readily pay, to one of the undermentioned bankers, the sum of 3s. per share on the allotment made to you, amounting to £6, for the purpose of meeting them. This payment, made in conformity with the resolutions, will relieve you from further liability, and, if desired, your letter of application will be returned; but the committee have great confidence that at no distant period the undertaking will be brought to a successful termination, and when resumed the subjoined banker's receipt will entitle you to a preference of shares to the extent of your allotment, of the deposit on which your present payment will form part.

“ I am, Sir, your obedient servant,

“ F. G. F., Secretary *pro tem*.

“ January, 1846.—Received, on account of the provisional committee of the Direct Exeter, Plymouth, and Devonport Railway Company, the sum of £ , to account for to them on demand.”

(Names of several bankers).

“ Direct Exeter, Plymouth, and Devonport Railway.—At a numerous meeting of the provisional committee, held this day at the offices of the Company, E. Woolmer, Esq., in the chair, the following resolutions were passed unanimously:—That the committee of management having agreed to pay into the banks mentioned in the prospectus, on or before the 10th of January next, the sum of 3s. per share on 200

shares, the provisional committee do pay the like amount per share on 100 shares, to meet the liabilities of the Company. That as it appears by the opinion of counsel that the applicants for shares are legally liable for the amount of deposit, 2*l.* 12*s.* 6*d.* per share, on their respective allotments, applications be made to each applicant for shares for the sum of 3*s.* on each share allotted; and that upon payment thereof such applicant be released from all further liability, and that they have a preference of shares to the extent of their present allotment, of which the aforesaid deposit will form part, when this undertaking is again proceeded with. That in the event of applicants for shares not paying the said deposit of 3*s.* per share on or before the 14th day of January next, this offer be considered to be cancelled, when other measures will be adopted. That the thanks of the meeting be given to the committee of management for the able and economical manner in which they have conducted the affairs of the Company."

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At the close of the plaintiffs' case it was objected, first, that the contract was not made with the committee of management, but with the provisional committee, and that they should have been the plaintiffs; secondly, that there had been a change in the members of the provisional committee in the interval between the application for and allotment of shares, and therefore there was no acceptance in the terms of the proposal; thirdly, that 36,000 shares only had been allotted, whereas the defendant had contracted to become a partner in a scheme which was to consist of 40,000 shares; fourthly, that the scheme had been abandoned, and there was a failure of consideration, citing *Nockels v. Crosby* (a); fifthly, that the proposal was to pay the deposit when required, and not on a particular day, as alleged in the declaration; sixthly, that plaintiffs contracted

(a) 3 B. & C. 814.

name of the person with whom the contract was actually made, or in the name of the parties really interested: *Skinner v. Stocks* (a). Secondly, the change in the members of the provisional committee, between the application for shares and the allotment of them, is immaterial, the plaintiffs in the present action having been the acting members of the committee of management during the whole period. As to the misdirection, the judge expressed his own opinion that the allotment to the defendant had been made, under the circumstances, within a reasonable time; but he left the question open to the jury, and they found that the allotment was made in a reasonable time.

(As no judgment was given on the other points, the arguments upon them are omitted.)

Kinglake, Serjt., and *Montague Smith*, in support of the rule.—The first question is, with whom was the contract made? The evidence shews it was made with the provisional committee, and not with the managing committee, whose names are not mentioned in the prospectus, nor did they exist when it was issued; the committee of management were only intrusted with a delegated authority of a limited character. The contract is to pay the provisional committee through the committee of management. In law, the contract is with the provisional committee: *Pigott v. Thompson* (b). Secondly, as to the change in the members of the committee. The contract is made up of the proposal and acceptance. This must be in the terms of the proposal, otherwise no contract arises. [Lord *Denman*, C. J.—You contend that the contract is not the same if the names be changed. The prospectus provides for an addition of names.] There is power to add to, but none to diminish, the numbers of the provisional committee. It might be that the defendant was induced to

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(a) 4 B. & Ald. 437.

(b) 3 Bos. & Pul. 147.

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apply for shares in the scheme upon the credit of the names of those particular individuals whose names were withdrawn before the allotment to him, and that the members of the committee remaining, at the time of the allotment to the defendant, were all of them insolvent.

Cur. adv. vult.

LORD DENMAN, C. J., now (a) delivered the judgment of the Court.—In this case, first, the prospectus and certain resolutions, shewing a provisional committee, and a part thereof as committee of management, and directing applications for allotments to be directed to the committee of management; and, secondly, the application of the defendant so directed; and, thirdly, the answer announcing the allotment from that body, were relied on for the plaintiffs to prove an express contract with them, being the committee of management.

On the part of the defendant, it was contended that his application for shares was made to the general body, and sent to the committee of management, as a part of that body appointed for convenience of communication, but not as having separate rights or powers; and to support this, he argued that applications to be admitted to a joint undertaking would be swayed much by considering who were joined therein; and that, in this case, between the application and allotment, some names had been withdrawn from the provisional committee, and some had been added; and that, after such a change, which might have materially altered his view, he ought to have the option of taking or refusing the allotted shares. Upon considering these facts, we think that the plaintiffs have not proved the defendant's contract to have been made with them, and that a nonsuit ought to be entered.

The defendant objected also to the time of the allot-

(a) May 29.

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Rule absolute for entering a nonsuit.

COURT OF CHANCERY.

BEFORE THE LORD CHANCELLOR.

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Held, by the Lord Chancellor, varying the order of *Knight Bruce*, V. C., that the petitioner had made out a case which entitled him to have the summary jurisdiction given to the Court by the Attorneys and Solicitors' Act (6 & 7 Vict. c. 73) exercised in his favour, and the usual order for the delivery and taxation of the solicitors' bill of costs was accordingly made. At the same time his Lordship dismissed a petition presented by the solicitors, the respondents, by way of appeal, which prayed that the order of *Knight Bruce*, V. C., might be discharged, modified, or varied, and the original petition dismissed.

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On the part of the defendant, it was contended that his application for shares was made to the general body, and sent to the committee of management, as a part of that body appointed for convenience of communication, but not as having separate rights or powers; and to support this, he argued that applications to be admitted to a joint undertaking would be swayed much by considering who were joined therein; and that, in this case, between the application and allotment, some names had been withdrawn from the provisional committee, and some had been added; and that, after such a change, which might have materially altered his view, he ought to have the option of taking or refusing the allotted shares. Upon considering these facts, we think that the plaintiffs have not proved the defendant's contract to have been made with them, and that a nonsuit ought to be entered.

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The LORD CHANCELLOR.—I have looked over the many affidavits filed in this matter, but it appears to me, that a very small proportion of them are material to the question on which I have to give judgment. I give no opinion as to the nature, extent, or value of the services of Sir G. Stephen, and the other solicitors who were respondents to this petition, nor as to whether the £28,000 paid to them by the provisional committee was or was not the proper sum for the committee to pay, and for the solicitors to receive.

The object of the petitioner is to have the means of inquiring into this by the delivery and taxation of the bill of costs; and the questions I have to decide are, first, whether the relative position of the parties was such as to bring the case within the jurisdiction which this Court exercises in matters of taxation; and, secondly, whether what took place between the parties excludes the petitioners from calling on the Court for the exercise of that jurisdiction. [His Lordship having read the letter of the 18th of November, from Messrs. Stephen and Hutchinson to the Chairman of the Company, and referred to the several facts stated *antè*, p. 279 et seq., proceeded as follows]:—

A point has been made by some of the affidavits, whether

some of the documents I have referred to were so received and adopted by the Company as to bind the parties who signed them by their contents. Now, it appears to me, that those who signed them must be taken to have thereby given their concurrence to the transaction, and to have established the relative situation of solicitor and client between themselves and the provisional committee. It also appears, that, as such solicitors, they had in their possession plans, sections, and other documents, the property of their clients; that they had taken, or threatened that they would take, proceedings against the provisional committee of the Company, and disputed the right and power of the committee to dismiss them; that they finally agreed to abstain from taking such proceedings, and to deliver up the plans, &c., and resign their office as solicitors, upon the consideration of receiving £28,000 for their costs, of which no bills had been delivered, and no particulars furnished to the Company. The receipts given by the respondents are in full of all demands; but, in the evidence to which I have referred, there is no mention of any demands, except the costs; and the terms of the receipts are so strong, that I must suppose that they were intended to exclude the taxation of the bills, if any were delivered. The provision, however, for the delivery of the bills of costs, must have been founded on the supposition, that costs were due from the provisional committee, and the payment by them of the sums mentioned seems to confirm what the documents indicated as to the nature of the demands made against the Company.

It appears to me, that costs, and costs only, were the consideration for those payments, although an attempt is made in the affidavits to represent that they were claims made, not merely as remuneration for past services, but as compensation for the loss of profits that would have arisen to them as solicitors, if they had not been dismissed, but continued in the exercise of their office. The written documents negative any such supposition, and when referred to

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A point has been made by some of the affidavits, whether

interested in the property of the Company, is now entitled to apply to this Court by petition for taxation of the bills of costs in question. [His Lordship here read parts of the 37th and 38th sects. of the Attorneys and Solicitors' Act (6 & 7 Vict. c. 73), set out, *antè*, p. 288 et seq.), and also the 41st and 43rd sects (a)]. The petitioner was, as I said, a member of the acting committee or governing body under whose direction and authority the employment of the solicitors had taken place, and who was liable to them, or, in the terms of the act, "chargeable;" besides which, he had, before the actual payment to the solicitors, become entitled to certain shares by contract, under which all the rights and liabilities incident to such shares became vested in him. He was, therefore, either a party liable to pay, or one whose money had been paid in discharge of the solicitors' demand, and he appears to me, therefore, entitled to the order of taxation which he seeks. The Vice-Chancellor *Knight Bruce* must have thought so too, because the petition was not dismissed, which it ought to have been, if the Court had been of opinion that the petitioner had no right to make the application.

I regret I have not been furnished with a note of the Vice-Chancellor's judgment, but I must assume that the order that the petition should stand over, must have been

(a) 41st sect., "That the payment of any such bill as aforesaid shall in no case preclude the Court or Judge, to whom application shall be made, from referring such bill for taxation, if the special circumstances of the case shall, in the opinion of such Court or Judge, appear to require the same, upon such terms and conditions as to such Court or Judge shall seem right, provided the application for such reference shall be made within twelve calendar months after payment."

43rd sect., "That all applica-

tions made under this act, to refer any such bill as aforesaid to be taxed and settled, and for the delivery of such bill, and for the delivering up of deeds, &c., shall be made in the matter of such attorney or solicitor; and that upon the taxation and settlement of any such bill, the certificate of the officer by whom such bill shall be taxed, shall (unless set aside or altered by order, decree, or rule of Court) be final and conclusive as to the amount thereof, and payment of the amount certified to be due, and directed to be paid, may be enforced," &c.

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founded on an opinion that no decided objection existed to the form of application.

If, then, Mr. Bass was in a position to make the application, the fact of payment could be no bar, for so the act declares. There is no evidence of any special contract which can be held to exclude the right of the committee as trustees to have the taxation they seek. The only remaining question is, whether there was anything in what passed at the time of payment, to exclude the summary jurisdiction of the Court, and to make it exercisable only in a regular suit instituted for that purpose.

It has not been contended in this case that any agreement existed before the business was done, as to the manner the costs were to be charged, or the mode by which the amount was to be ascertained, as in the case of *Holland v. Gwynne*, in *re Byrch* (a), nor are there any facts in this case to bring it within the authority of *Barwell v. Brooks*, in the matter of *Cattlin* (b). The observation of the Master of the Rolls in that case, as to the Court not having jurisdiction upon a petition with respect to a settled account, must be understood to have reference to the facts of the case, in which the amount of the bill of costs formed an item in that settled account, the balance of which had been paid to the client. The observation could not have been intended to apply to a case of mere settlement of a bill of costs, for that would have been to repudiate the jurisdiction of the Court, on petition, in every case of payment, which must be considered in itself a settlement. The Master of the Rolls has, in many cases, acted upon the authority of former decisions, many of which were commented on by me in *Horlock v. Smith* (c), and *Waters v. Taylor* (d), and has, under special circumstances upon petition, opened such settlement and directed the taxation of paid bills, as in *Ex parte Wells* (e); and although no

(a) 8 Bea. 124.

(b) Ibid. 121.

(c) 2 Myl. & Cr. 495.

(d) 2 Myl. & Cr. 526.

(e) 8 Bea. 416.

order was made, yet the principle was distinctly recognised in *In re Fyson* (a), and *In re Lees* (b).

The refusal of the Master of the Rolls *In the Matter of Whitcombe* (c), to direct the taxation of a bill of costs, has been referred to as throwing some doubt on the jurisdiction of this Court; but the facts of that case are very peculiar, and the expressions made use of by the Master of the Rolls must be considered as having reference to them, and cannot be put in competition with the authorities I have before referred to.

If the petitioner, Mr. Bass, were in a position to entitle him to make this application, and if the connection between the parties were clearly that of solicitor and client, and the account between them were merely one of costs, and if the payment and settlement of such account do not exclude the summary jurisdiction of the Court, the only remaining question is, whether there are special circumstances in this case which authorise the exercise of such summary jurisdiction.

This is not a case in which errors have to be inquired into, one of the complaints being, that the client has not received any account, and must, therefore, be ignorant of what such account may contain; but it is a case of pressure, and one in which undue advantage has been taken by the solicitors of the exigencies of the client, and the powers they have acquired have been abused. Of the existence of such pressure and improper dealing the letter of the 18th of November, and the language of the receipt, leave but little, if anything were wanting, to complete the proof. They prove threats by the solicitors to act contrary to the wishes of his client, a denial of the client's right to dismiss him, a withholding of papers belonging to him, and a stipulation that a sum of £28,000 for costs should be paid amongst the several solicitors (of which Stephen and Hutchinson were to have £18,000) as the condition of the

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(a) 9 Beav. 117.

(b) 5 Beav. 410.

(c) 8 Beav. 140.

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solicitors abstaining from acting upon such assumed rights, and carrying their threats into execution ; and the evidence proves, that at the time of payment, and as the reason for making it, the circumstances of the Company were such as to require the immediate possession of the documents, which could only be obtained by submitting to the terms imposed upon them.

The agreement stipulated, in the strongest terms, that the transaction should be a final and complete settlement of all matters in difference ; but, if the case would otherwise come within the jurisdiction of this court, that jurisdiction will not be ousted by the terms the solicitor has imposed on his client ; besides, the agreement for a settlement provided that a bill of costs should be delivered with all practicable speed, and already two years have elapsed without such bill having been delivered. The first thing will be to compel the delivery of such bill, for until this be done the client cannot know the extent of his case against the solicitor. I purpose, therefore, to make the usual order against the solicitor for the delivery and taxation of his bill.

[His Lordship then directed that the order should be made on the petition of the petitioner Bass, and that the petition of Sir George Stephen and others should be dismissed.]

BEFORE KNIGHT BRUCE, V. C.

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ON the 1st December, 1846, the petitioner Bass, in consequence of the order of His Honor, of the 9th July, 1846, filed his bill, praying that it might be declared that the payment of the several sums of £18,000, £5000, and £5000 to the defendants, Sir G. Stephen, B. M. Hutchinson, W. Rogers, and R. B. B. Cobbett, out of the funds of

Remington's Company, was improperly and fraudulently obtained by the said defendants, by means of pressure and undue influence, and that the last-named defendants might be decreed to refund the same to the plaintiff, as one of the directors of the said Company; or, &c.; or to account for the same, &c.; and to deliver to the plaintiff a bill of fees, &c.; plaintiff, as one of the directors of the Company, submitting to pay what should be found due on taxation, and praying a reference for that purpose; and that the said defendants might be charged with the before-mentioned sums, and refund what the Master should certify to have been overpaid; and also praying an injunction to prevent the defendants from taking any proceedings at law until after the Master should have made his report.

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In consequence of the judgment of the Lord Chancellor, the plaintiff, considering it unnecessary to prosecute the suit, moved, before *Knight Bruce*, Vice-Chancellor, to dismiss his bill as against all the defendants, without costs; when His Honor was pleased to order, that the motion should stand over until the Master had made his certificate under the Lord Chancellor's order for taxation, or until further order, with liberty to apply; all proceedings in the cause to be stayed in the meantime.

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Feb. 8th,
1848.

The LORD CHANCELLOR.—I have looked over the many affidavits filed in this matter, but it appears to me, that a very small proportion of them are material to the question on which I have to give judgment. I give no opinion as to the nature, extent, or value of the services of Sir G. Stephen, and the other solicitors who were respondents to this petition, nor as to whether the £28,000 paid to them by the provisional committee was or was not the proper sum for the committee to pay, and for the solicitors to receive.

The object of the petitioner is to have the means of inquiring into this by the delivery and taxation of the bill of costs; and the questions I have to decide are, first, whether the relative position of the parties was such as to bring the case within the jurisdiction which this Court exercises in matters of taxation; and, secondly, whether what took place between the parties excludes the petitioners from calling on the Court for the exercise of that jurisdiction. [His Lordship having read the letter of the 18th of November, from Messrs. Stephen and Hutchinson to the Chairman of the Company, and referred to the several facts stated *antè*, p. 279 et seq., proceeded as follows]:—

A point has been made by some of the affidavits, whether

some of the documents I have referred to were so received and adopted by the Company as to bind the parties who signed them by their contents. Now, it appears to me, that those who signed them must be taken to have thereby given their concurrence to the transaction, and to have established the relative situation of solicitor and client between themselves and the provisional committee. It also appears, that, as such solicitors, they had in their possession plans, sections, and other documents, the property of their clients; that they had taken, or threatened that they would take, proceedings against the provisional committee of the Company, and disputed the right and power of the committee to dismiss them; that they finally agreed to abstain from taking such proceedings, and to deliver up the plans, &c., and resign their office as solicitors, upon the consideration of receiving £28,000 for their costs, of which no bills had been delivered, and no particulars furnished to the Company. The receipts given by the respondents are in full of all demands; but, in the evidence to which I have referred, there is no mention of any demands, except the costs; and the terms of the receipts are so strong, that I must suppose that they were intended to exclude the taxation of the bills, if any were delivered. The provision, however, for the delivery of the bills of costs, must have been founded on the supposition, that costs were due from the provisional committee, and the payment by them of the sums mentioned seems to confirm what the documents indicated as to the nature of the demands made against the Company.

It appears to me, that costs, and costs only, were the consideration for those payments, although an attempt is made in the affidavits to represent that they were claims made, not merely as remuneration for past services, but as compensation for the loss of profits that would have arisen to them as solicitors, if they had not been dismissed, but continued in the exercise of their office. The written documents negative any such supposition, and when referred to

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they shew how absolutely the Company were in the power of their solicitors, and how that power had been exercised. The petitioner, Mr. Bass, although a member of the provisional committee, appears not only not to have been a party in the first instance to the payment of these sums to the respondents, but afterwards to have protested against it; however, he was at length induced to allow the arrangement to proceed, on the representation of the vital consequence it would be to the interests of the Company, who were then about to apply to Parliament for an act, if that arrangement were not carried into effect. Subsequently, a bill having been filed against Mr. Bass and others, complaining, amongst other things, of the misapplication of the sums paid to the respondents, he presented this petition, in order that, by compelling a legal settlement of the claims of the respondents, the solicitors, he might protect himself against the case made in respect of these matters by the suit.

The question is, whether he is entitled to what he prays for, under the provisions of the act, upon petition; or, whether, as the Vice-Chancellor seems to have thought, it was necessary for him to have proceeded by bill. It is necessary first to consider the position of this petitioner, because it is contended, that he is not in such a position as to ask for taxation of the bills. The petitioner Bass became one of the acting committee of the Company in August, 1845, and has so continued ever since; he agreed to become proprietor of the shares allotted to him; and, on the 20th of November, 1845, agreed to purchase thirty other shares, on which the deposit had been paid, but in respect of which the greater part of the purchase-money was afterwards settled in account on the 4th of December following.

The question is, whether Mr. Bass, being a member of the acting committee, and as such member a trustee for the shareholders of the Company, on whose behalf he applied the property of the Company in payment of the £28,000; or, being a shareholder himself, and in that character in-

interested in the property of the Company, is now entitled to apply to this Court by petition for taxation of the bills of costs in question. [His Lordship here read parts of the 37th and 38th sects. of the Attorneys and Solicitors' Act (6 & 7 Vict. c. 73), set out, *antè*, p. 288 et seq.), and also the 41st and 43rd sects (*a*)]. The petitioner was, as I said, a member of the acting committee or governing body under whose direction and authority the employment of the solicitors had taken place, and who was liable to them, or, in the terms of the act, "chargeable;" besides which, he had, before the actual payment to the solicitors, become entitled to certain shares by contract, under which all the rights and liabilities incident to such shares became vested in him. He was, therefore, either a party liable to pay, or one whose money had been paid in discharge of the solicitors' demand, and he appears to me, therefore, entitled to the order of taxation which he seeks. The Vice-Chancellor *Knight Bruce* must have thought so too, because the petition was not dismissed, which it ought to have been, if the Court had been of opinion that the petitioner had no right to make the application.

I regret I have not been furnished with a note of the Vice-Chancellor's judgment, but I must assume that the order that the petition should stand over, must have been

(*a*) 41st sect., "That the payment of any such bill as aforesaid shall in no case preclude the Court or Judge, to whom application shall be made, from referring such bill for taxation, if the special circumstances of the case shall, in the opinion of such Court or Judge, appear to require the same, upon such terms and conditions as to such Court or Judge shall seem right, provided the application for such reference shall be made within twelve calendar months after payment."

43rd sect., "That all applica-

tions made under this act, to refer any such bill as aforesaid to be taxed and settled, and for the delivery of such bill, and for the delivering up of deeds, &c., shall be made in the matter of such attorney or solicitor; and that upon the taxation and settlement of any such bill, the certificate of the officer by whom such bill shall be taxed, shall (unless set aside or altered by order, decree, or rule of Court) be final and conclusive as to the amount thereof, and payment of the amount certified to be due, and directed to be paid, may be enforced," &c.

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founded on an opinion that no decided objection existed to the form of application.

If, then, Mr. Bass was in a position to make the application, the fact of payment could be no bar, for so the act declares. There is no evidence of any special contract which can be held to exclude the right of the committee as trustees to have the taxation they seek. The only remaining question is, whether there was anything in what passed at the time of payment, to exclude the summary jurisdiction of the Court, and to make it exercisable only in a regular suit instituted for that purpose.

It has not been contended in this case that any agreement existed before the business was done, as to the manner the costs were to be charged, or the mode by which the amount was to be ascertained, as in the case of *Holland v. Gwynne*, in *re Byrch* (a), nor are there any facts in this case to bring it within the authority of *Barwell v. Brooks*, in the matter of *Catlin* (b). The observation of the Master of the Rolls in that case, as to the Court not having jurisdiction upon a petition with respect to a settled account, must be understood to have reference to the facts of the case, in which the amount of the bill of costs formed an item in that settled account, the balance of which had been paid to the client. The observation could not have been intended to apply to a case of mere settlement of a bill of costs, for that would have been to repudiate the jurisdiction of the Court, on petition, in every case of payment, which must be considered in itself a settlement. The Master of the Rolls has, in many cases, acted upon the authority of former decisions, many of which were commented on by me in *Horlock v. Smith* (c), and *Waters v. Taylor* (d), and has, under special circumstances upon petition, opened such settlement and directed the taxation of paid bills, as in *Ex parte Wells* (e); and although no

(a) 8 Bea. 124.

(b) Ibid. 121.

(c) 2 Myl. & Cr. 495.

(d) 2 Myl. & Cr. 526.

(e) 8 Bea. 416.

order was made, yet the principle was distinctly recognised in *In re Fyson* (a), and *In re Lees* (b).

The refusal of the Master of the Rolls *In the Matter of Whitcombe* (c), to direct the taxation of a bill of costs, has been referred to as throwing some doubt on the jurisdiction of this Court; but the facts of that case are very peculiar, and the expressions made use of by the Master of the Rolls must be considered as having reference to them, and cannot be put in competition with the authorities I have before referred to.

If the petitioner, Mr. Bass, were in a position to entitle him to make this application, and if the connection between the parties were clearly that of solicitor and client, and the account between them were merely one of costs, and if the payment and settlement of such account do not exclude the summary jurisdiction of the Court, the only remaining question is, whether there are special circumstances in this case which authorise the exercise of such summary jurisdiction.

This is not a case in which errors have to be inquired into, one of the complaints being, that the client has not received any account, and must, therefore, be ignorant of what such account may contain; but it is a case of pressure, and one in which undue advantage has been taken by the solicitors of the exigencies of the client, and the powers they have acquired have been abused. Of the existence of such pressure and improper dealing the letter of the 18th of November, and the language of the receipt, leave but little, if anything were wanting, to complete the proof. They prove threats by the solicitors to act contrary to the wishes of his client, a denial of the client's right to dismiss him, a withholding of papers belonging to him, and a stipulation that a sum of £28,000 for costs should be paid amongst the several solicitors (of which Stephen and Hutchinson were to have £18,000) as the condition of the

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(a) 9 Beav. 117.

(b) 5 Beav. 410.

(c) 8 Beav. 140.

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solicitors abstaining from acting upon such assumed rights, and carrying their threats into execution ; and the evidence proves, that at the time of payment, and as the reason for making it, the circumstances of the Company were such as to require the immediate possession of the documents, which could only be obtained by submitting to the terms imposed upon them.

The agreement stipulated, in the strongest terms, that the transaction should be a final and complete settlement of all matters in difference ; but, if the case would otherwise come within the jurisdiction of this court, that jurisdiction will not be ousted by the terms the solicitor has imposed on his client ; besides, the agreement for a settlement provided that a bill of costs should be delivered with all practicable speed, and already two years have elapsed without such bill having been delivered. The first thing will be to compel the delivery of such bill, for until this be done the client cannot know the extent of his case against the solicitor. I purpose, therefore, to make the usual order against the solicitor for the delivery and taxation of his bill.

[His Lordship then directed that the order should be made on the petition of the petitioner Bass, and that the petition of Sir George Stephen and others should be dismissed.]

BEFORE KNIGHT BRUCE, V. C.

1848.
 Feb. 23rd.

On the 1st December, 1846, the petitioner Bass, in consequence of the order of His Honor, of the 9th July, 1846, filed his bill, praying that it might be declared that the payment of the several sums of £18,000, £5000, and £5000 to the defendants, Sir G. Stephen, B. M. Hutchinson, W. Rogers, and R. B. B. Cobbett, out of the funds of

Remington's Company, was improperly and fraudulently obtained by the said defendants, by means of pressure and undue influence, and that the last-named defendants might be decreed to refund the same to the plaintiff, as one of the directors of the said Company ; or, &c. ; or to account for the same, &c. ; and to deliver to the plaintiff a bill of fees, &c. ; plaintiff, as one of the directors of the Company, submitting to pay what should be found due on taxation, and praying a reference for that purpose ; and that the said defendants might be charged with the before-mentioned sums, and refund what the Master should certify to have been overpaid ; and also praying an injunction to prevent the defendants from taking any proceedings at law until after the Master should have made his report.

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In consequence of the judgment of the Lord Chancellor, the plaintiff, considering it unnecessary to prosecute the suit, moved, before *Knight Bruce*, Vice-Chancellor, to dismiss his bill as against all the defendants, without costs ; when His Honor was pleased to order, that the motion should stand over until the Master had made his certificate under the Lord Chancellor's order for taxation, or until further order, with liberty to apply ; all proceedings in the cause to be stayed in the meantime.



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PRINCIPAL MATTERS.

ACCOUNT, (ITEMS OF), &c.

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ACQUIESCENCE.

Acquiescence by shareholders in a project, for however long a period, affords no presumption that such project is legal. *Colman v. Eastern Counties Railway*, 513

ACTION AT LAW.

A bill was filed by L., stating himself to be a partner in a projected Company (which afterwards failed), against sixteen of the managing committee, and against B., a creditor of the Company, who had commenced an action against L. for a debt due by the Company, praying an injunction to restrain the action brought by B., or by the other defendants in his name, and to restrain the committee from distributing the assets of the Company, except in discharge of the debts, and praying that all proper accounts might be taken. The defendant B. demurred for want of equity, for multifariousness, and for want of parties. Demurrers overruled. *Lewis v. Billing*, 414

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PROMOTER.

1. An agreement containing a stipulation which might vitiate it, becomes perfect, and such as a court of equity will sanction, when parties mutually release each other from that stipulation. *Columbine v. Chichester*, 432

2. Scrip certificates of railway shares are not "goods, wares, or merchandise" within the Stamp Act. The defendant verbally agreed to purchase of the plaintiff fifty scrip certificates of shares in a railway company, at a stated price; subsequently, on the same day, the defendant signed a memorandum setting forth the terms of the agreement, and caused it to be delivered to the plaintiff:—*Held*, that this memorandum was the contract of sale, and required an agreement stamp. *Knight v. Barber*, 674

**ALLOTTEE—ALLOTMENT,
(LETTERS OF), 1.**

See COMMITTEE, 14.

DEMURRER, 3.

1. A. gave an order to B., a stock-broker, to purchase shares in a foreign

railway. There were no shares in the market, and B. bought a letter of allotment, it being the practice of the Stock Exchange at that time to buy and sell letters of allotment as shares, in that railway. In an action to recover the value of the shares and the broker's commission:—*Held*, that the question for the jury to determine was, whether the order to buy had reference to that which alone could be bought in the market at that time, or was an order to buy at a future time, when, by the passing of the foreign act, actual shares would be transferable and purchasable. *Mitchell v. Newhall*, 300

2. In an action by an allottee to recover deposits from a member of the provisional committee of a railway company, provisionally registered under the 7 & 8 Vict. c. 110, it appeared that a prospectus had been issued, stating that the capital was to be £2,000,000, in 80,000 shares of £25 each, and that the deposit required was 2*l.* 12*s.* 6*d.* per share. The plaintiff applied to the provisional committee for shares, and received a letter of allotment for thirty shares, signed by the secretary, which required payment of the deposit thereon, to one of certain bankers therein named, on or before a certain day, otherwise the allotment would be null and void; and stated, that the letter, with the banker's receipt appended thereto, would be exchanged for scrip, on the plaintiff presenting it at the office of the Company, and executing the parliamentary contract and subscribers' agreement. The plaintiff duly paid the deposit, but after several applications for scrip was informed by the secretary, that the directors did not mean to issue scrip; and on plaintiff requiring the repayment of her deposit money, she was told by one of the provisional committee, not the defendant, that a statement would

be made of the concerns of the Company, and the surplus divided.

Held, first, that the application for shares and payment of the deposit amounted to nothing if the scheme proved abortive; and that the allottee might recover the amount deposited from the defendant in an action for money had and received.

Secondly, That there was evidence to go to the jury, and from which they might infer that the concern was abandoned.

Quere, whether, under such circumstances, the plaintiff could recover on a special count in assumpsit for not delivering scrip. *Walstab v. Spottiswoode*, 321

3. Certain persons issued a prospectus for a railway company, stating the capital to be £3,000,000, in 120,000 shares of £25 each; and that, in case Parliament should not sanction the undertaking, the money deposited, minus the expenses attending the projection, would be returned. The plaintiff sent a letter of application for shares in the form given by the prospectus. To this letter he received a written answer, allotting him sixty shares, but conditionally upon the deposit being paid before a certain day, in default of which the shares would be forfeited. Prior to the day fixed for payment of the deposit, the committee published an advertisement giving notice that they had completed the allotment, and stating, by way of apology to disappointed applicants, that they had been obliged to give a preference to those locally interested. Evidence was given that the plaintiff saw this advertisement, and that he subsequently paid his deposit. Notwithstanding that applications had been made for 120,000 shares, 58,000 only were allotted. Afterwards the plaintiff executed the subscription-deed, which gave power to the committee to pay the expenses

out of the deposits. The plaintiff attended a meeting of shareholders on the 15th of December. The deposits, except £400, being expended, and there being no funds for making the necessary parliamentary deposit, a resolution was proposed for a further allotment of shares. The plaintiff objected, and moved, as an amendment, that the deposits should be returned. This amendment the chairman did not put to the meeting. The undertaking was afterwards abandoned. The plaintiff brought an action against one of the managing committee to recover the money he had paid as a deposit on the shares allotted to him.

Held, First, That there was no contract binding on the plaintiff, the allotment being in a company having a less capital than that in which shares were applied for, and the letter of allotment also being conditional, and not a simple acceptance of the plaintiff's proposal.

Secondly, That the evidence warranted the jury in finding that there was a fraudulent misrepresentation by the advertisement, and that the representation so made was a material inducement to the plaintiff to pay his money; consequently, that the subscription-deed was no answer to the action.

Thirdly, That, notwithstanding the plaintiff's attendance at the meeting of the 15th of December, he was in a condition to maintain the present action.

Fourthly, That the absence of any opinion by the judge at the trial, whether the notice of application and allotment did or did not constitute a binding contract, was no ground for a new trial, that being a question of law for the Court, and not of fact for the jury. *Wontner v. Shairp*, 542

AMALGAMATION.

See COMMITTEE, 10.

ASSESSMENT.

See RATING.
TITHES.

BANKRUPT.

A broker, by order of a customer, purchased certain scrip shares in a projected Company provisionally registered, but the purchase-money not having been paid on the settling day, the broker sold them again at a loss. The customer having become bankrupt, the broker applied to prove for the loss, but was refused by the Commissioner. On application by petition to the Court of Review, the petitioner was allowed to go before the Commissioner to establish his proof. *Ex parte Barton re Charles*, 371

BILL OF COSTS.

See COMMITTEE, 1.

A petition was presented by a member of the provisional committee of a projected railway company, stating circumstances from which it appeared, that, in consequence of pressure and improper dealing by the solicitors employed by the committee, they had been induced to pay over a large sum of money to such solicitors in full of all demands, and at the same time had entered into an agreement, stipulating, in the strongest terms, that the transaction should be a final and complete settlement of all matters between them. The petition prayed the delivery and taxation of the solicitors' bill of costs.

Held, by the Lord Chancellor, varying the order of *Knight Bruce*, V. C., that the petitioner had made out a case which entitled him to have the summary jurisdiction given to the

Court by the Attorneys and Solicitors' Act (6 & 7 Vict. c. 73) exercised in his favour, and the usual order for the delivery and taxation of the solicitors' bill of costs was accordingly made. At the same time his Lordship dismissed a petition presented by the solicitors, the respondents, by way of appeal, which prayed that the order of *Knight Bruce*, V. C., might be discharged, modified, or varied, and the original petition dismissed. *Ex parte Bass*, 723

BRIDGE.

By a Railway Act, 7 Vict. c. 15, s. 241, a Company were required to construct a bridge over the river Y., so as to leave the same width of waterway under the same as then existed at the point where the river was crossed, and so that there should be a clear height of five feet above the ordinary level of the river; provided that, after notice given to the Company by any owner or occupier of lands adjoining the railway, that the said bridge was not made according to the true intent and meaning of the act, it should be lawful for such owner or occupier to apply for and obtain an order from a justice of peace enabling such person to make such bridge accordingly, the expenses to be defrayed by the Company.

The Company were constructing a bridge which did not comply with either of the above provisions, whereupon a landowner gave them notice requiring them to construct a bridge, leaving the former width of waterway, and the clear height of five feet above the water, in the terms of the act. The Company replied, that they would do the first, and would accept process as to the second. They afterwards made the bridge the required height, and, to preserve the same width of waterway, commenced cutting the banks of the river, which they after-

COMMISSIONERS.

wards discontinued. To subsequent applications to proceed with the work they returned no answer.

Held, that the above facts amounted to a refusal to do what was demanded, and that the applicant was entitled to a mandamus, notwithstanding the powers given him of applying to a justice. *Reg. v. The Norwich and Brandon Railway Company*, 112

BUBBLE COMPANY.

See COMMITTEE, 9.

CALLS (ON SHARES).

A testator, who, at the time of his death, was possessed of fifty original and seventy purchased shares in a railway, the calls whereon had not all been made, by his will gave thirty whole shares in the said railway to trustees for the benefit of a married woman for life, without power of anticipation, and thirty shares to B. Twenty-five original and five purchased shares having been allotted by the executors to each of the legatees: — *Held*, that the testator's estate was liable to pay the calls on the original and on the purchased shares, and a sufficient sum to cover the unpaid calls was ordered to be placed to a separate account, and laid out, and the income meanwhile paid to the persons entitled to the general residue. *Jacques v. Chambers*, 499

COMMISSIONERS.

1. By a Navigation Act, 3 Vict. c. 55, it is provided, that no act of the commissioners thereby appointed shall be valid unless done at a meeting of the commissioners, and all the powers of the act shall be executed by the majority of the commissioners present at a meeting, not less than three being present. Sect. 12 provides that they shall and may be sued in the name of their clerk.

A resolution had been passed by the commissioners that their engineer should prepare specifications, with a view to a contract for the performance of certain works, and that tenders should be received for them. At a meeting at which seven of the commissioners were present, they unanimously resolved to accept a tender made by B. The contract was prepared by their secretary, and signed by B. Three commissioners only were named in the contract as parties to it, and by none of these was it executed. It contained a clause that all such parts of the work as were not specified in the contract or plans should be executed in such manner as the surveyor of the works should direct.

In the construction of the work, B. had occasion to move back a bank, which he re-erected of insufficient materials. Water was prematurely admitted, which sunk the bank, and went over it into the plaintiff's land.

Held, that the contract, and work done under it, were acts done by the commissioners, for which they might properly be sued in the name of their clerk.

But that the injury having arisen from the imperfect construction of the bank, which was part of the work specified in the contract, the contractor, and not the commissioners, was liable for the damage. *Allen v. Hayward*, 104

2. The owner of certain lands at O. had used from time immemorial a certain ancient watercourse, for the purpose of draining his lands; and for the improvement of the drainage, had altered a bridge some distance below them. The commissioners appointed by an inclosure and drainage act cut some new drains into the ancient watercourse at a point below the plaintiff's land, but above the bridge, whereupon he filed a bill for an in-

junction, on the ground that the accession of water brought down by the new drains would obstruct his flow of water.

On the motion to dissolve an injunction obtained *ex parte*, an issue was directed, and an *interim* injunction granted.

The verdict having been given in favour of the plaintiff, the defendant moved for a new trial, which was granted, on the ground that events had happened since the trial of the issue which would enable the jury to give a verdict founded on experience.

Held, that the rule that an individual may so use his own property as not to injure his neighbours, applies to persons acting under inclosure and other acts of Parliament of a similar nature. *Dawson v. Paver*, 81

COMMITTEE (PROVISIONAL).

See ALLOTTEE, 2.
DEMURRER.
PROMOTER.

1. In an action by an engineer against the provisional committee of a railway company, for surveying a line of railway and branches, and supplying books of reference, it is not necessary that he should state in his particulars of demand the charge per mile of the survey, nor the number or contents of the books of reference. *Higgins v. Ede*, 126

2. A plaintiff, a solicitor, was the promoter of a railway scheme, which he caused to be provisionally registered, and at a public meeting made a statement of the steps taken by him with reference to such scheme. At this meeting certain persons were nominated to form a provisional committee, and at the same meeting, on a suggestion by the chairman, the plaintiff gave an indemnity to each of the provisional committee-men against any

personal liability in respect of the costs of prosecuting the scheme up to the time of the payment of the deposits, and undertook that he would pay all future costs, and look for payment thereof out of the first assets of the Company received by way of deposits or otherwise; and the committee agreed that he should receive such costs out of the deposits.

The deposits were paid up to the amount of £50,000, and shortly afterwards the services of the plaintiff were discontinued, whereupon he brought in his bill, and demanded payment thereof out of the funds in the hands of the provisional committee. A small amount was paid, but £800 and upwards remained due to the plaintiff, which the committee refused to pay, whereupon the plaintiff filed his bill, making all the provisional committee parties defendants thereto, and praying the declaration of the Court, that the deposits were effectually charged with the balance due to him, and that he was entitled to an equitable lien thereon for the same, and that the defendants might be decreed to pay the same.

The defendants demurred to the bill for want of equity, and also for want of parties.

Demurrer overruled on both points, with costs. *Parsons v. Spooner*, 163

3. Under an act of Parliament a Company was empowered to raise £70,000, by the creation of new shares; and, at a meeting of proprietors, on the 25th of July, it was, by the second resolution, declared, "that every proprietor now registered, and also every holder of any scrip receipts, who shall have delivered up the same on or before the 10th August next to be duly registered, shall have the option of subscribing for one of such new shares for and in respect of every five shares which every such proprietor may now, or which every such

scrip holder may on the said 10th of August have registered in their names." The 4th resolution provided, "that the shares which shall not be subscribed for under the option allowed by the 2nd condition, shall be allotted by the directors to those persons who may, on or before the said 10th August, apply for any such shares, *pro rata*, according to the number of shares so applied for by each proprietor, unless the whole number of shares so applied for shall exceed the number not subscribed for under the 2nd condition, in which case they shall be allotted to the applicants in proportion to the shares respectively held by them." A registered proprietor of 400 shares, being resident in Naples, did not receive and could not have received notice, in time to make his application before the 10th of August, but did so make it at the earliest moment. The shares having been all appropriated before A.'s application, he filed his bill against the directors for his new shares:—*Held*, upon the construction of the 2nd and 4th resolutions, that A. should have made his election before the 10th August, and that the resolutions did not make any difference between the registered proprietors and the holders of scrip as to the time of election. Demurrer for want of equity allowed with costs. *Pearson v. The London and Croydon Railway Company*, 62

4. In an action by an engineer for surveying a line of railway, the Court will not compel him to give minute particulars of the items of his demand; it is sufficient if he gives such reasonable information as shall enable the defendant to ascertain how much he should pay into court, or resist at the trial. *Renny v. Beresford*, 129

5. A railway company having been formed, the secretary wrote to the defendant inviting him to be a member of the provisional committee,

to which he wrote a letter of assent. His name was then published as one of the provisional committee, and he afterwards presided at a meeting of that committee. An action having been brought against him for the price of stationery supplied by order of the secretary:—*Held*, that the proper question for the jury was, whether the defendant, by assenting to join the provisional committee, had authorised the pledging of his credit for such things as were necessary for the use of that committee; and, therefore, that the jury were right in finding that he was liable for the stationery supplied after such consent.

Quære, whether, on a division of the committee, an action can be maintained against one of the minority for goods supplied by the order of the majority. *Barnett v. Lambert*, 308

6. Where, in an action by the provisional committee suing in behalf of a railway company, one of the plaintiffs, who held fifty shares in the undertaking, executed to the defendants a release of the cause of action, the Court refused to set aside the plea, the releasor having a valid interest in the concern, and not being a mere trustee for others. *Rawsthorne v. Gandell*, 295

7. The mere fact of a person agreeing to become a member of a provisional committee amounts to no more than a promise that he will act with other persons appointed or to be appointed for the purpose of carrying some particular scheme into effect.

But if he authorises his name to be inserted in a particular prospectus, it is a question for the jury to say what inference a reasonable man would draw from the terms of the prospectus. If it state merely the name of the provisional committee, and nothing more, that circumstance does not alter the liability; but if it state the names of the acting committee also, the question

is, whether it means that the latter are to take the whole management to the exclusion of the former, or that the former have constituted the latter their agents on their behalf, in which case they would be liable for contracts made by such agents. Or if it state the name of a solicitor, the question would be, whether it meant that he was to be employed by those of the committee who acted, or was already appointed by all whose names were mentioned, as their solicitor, to do all solicitor's business on their behalf; and a further question of fact, what was the business at the time of the contract usually transacted by solicitors in such schemes on behalf of the Company; and so as to the secretary.

Such an intended association is not a partnership, as it constitutes no agreement to share in profit and loss, being formed merely for carrying into effect the preliminary arrangements for promoting the scheme.

Therefore, in an action against a provisional committee-man for goods supplied to the order of the solicitor,—*Held*, that the law will not imply, from the mere fact of his agreeing to be one, an authority given by him to every other provisional committee-man to make contracts by himself or the solicitor, nor an authority to the solicitor to make them on behalf of the committee.

But where there is also evidence of the defendant having acted with relation to the proposed scheme, it is a question for the jury, whether, by his consent and acts, he has in fact become a provisional committee-man, and has authorised the solicitor, or secretary, or any member of the committee, to pledge his credit for the necessary and ordinary expenses in forming such a Company; and, if so, whether the work was done, and credit given, on the faith of his being liable. *Reynell v. Lewis. Wyld v. Hopkins*, 351

8. A company was formed for making a projected railway; but before any shares were allotted, or deposits paid, the majority of the provisional committee determined to abandon the project, and a resolution was passed, that each member of the committee should pay £30 to defray expenses incurred.

One of the provisional committee, who had not contributed, filed his bill, on behalf of himself and all other parties interested as partners in the Company, except the defendants, against ten of the provisional committee, who had been appointed the audit committee of the Company, for an account of the monies and property, and the debts and liabilities of the Company; and also for a receiver, and injunction against all the defendants; and also an injunction against one of the defendants, who had acted as secretary to the Company, to restrain him from prosecuting an action brought by him against the plaintiff for a debt alleged to be due to him from the Company.

To this bill the defendants demurred, for want of equity and for want of parties generally; and particularly, because all the persons who had contributed monies on account of the said undertaking, and also because all the members of the provisional committee had not been made parties.

Held, by Lord Chancellor, on appeal, that the demurrer, which had been overruled by *Knight Bruce*, V. C., should be allowed. *Sharp v. Day*, 261

9. A purchaser of scrip in a projected Spanish Railway Company filed his bill against the provisional committee of that Company, praying that an agreement entered into by them with a promoter of a railway, whereby he was to receive a large sum out of the subscribed funds of the Company, might be declared void; and also

praying a general account of the affairs of the Company.

The bill having made a case against the directors, from which it would appear that the scheme was a fraud upon the plaintiff, and that the Company was in fact a bubble company, a demurrer to the bill for want of equity was allowed, on the ground that the plaintiff having made out a case of fraud against the defendants, he was not entitled to the detailed relief sought by his bill.

Semble, that where a bill contains averments as to the effect of certain articles of a foreign law, but is silent as to others, the Court will presume that the foreign law only differs from the English in the particulars stated. *Harvey v. Collett*, 387

10. The provisional committee of management of a projected railway (the South and Midland) were by the subscription contract invested with full power and authority to fix upon, and from time to time to alter and vary, the points or places at which the intended railway should commence and terminate, and the intermediate course, route, or line thereof; and it was amongst other things agreed, that they should have ample power to carry all or any part or parts of the undertaking as described in the parliamentary contract into effect, and to make contracts with railway or canal proprietors, and generally to adopt all such measures whatsoever as any board, or meeting, or committee of management might in their judgment think necessary or expedient, or might be advised to adopt, and particularly to apply for an act, &c.

The committee having, by default of their engineer, failed to comply with the standing orders of the House of Commons, entered into an arrangement to amalgamate with another railway company (the Manchester

and Poole) who had complied therewith, and to pay in the required parliamentary deposit for them, and also to pay them £8000 on account of the expenses incurred, which payment was to form an item to the credit of the South and Midland Railway Company.

The sum of £55,000 was accordingly deposited in court, to the credit of the Manchester and Poole Railway Company, in the names of three of the directors of the first and two of the last-mentioned railway Company.

Some of the shareholders in the South and Midland Railway Company having protested against this arrangement, filed their bill for an account of the deposits, &c., and also for an injunction to restrain three of the persons in whose names the parliamentary deposit had been made, from prosecuting an order which they had obtained on petition, for payment out of court to them of the sum deposited:—*Held*, on motion for an injunction in the terms of the prayer of the bill, that the committee of the South and Midland Company had no right to destroy the individuality of their company, or the original character, rights, and powers of the projectors, and that they were not justified in paying the money of their cestui que trusts for an indefinite demand, and so as to form an item of account between themselves and another company.

Injunction accordingly granted.
Gilbert v. Cooper, 396

11. Under similar circumstances to those set forth in the preceding case, the Lord Chancellor granted an injunction, but without costs, against those persons only who were not directors of the original company, but refused it as to those who were. An order for payment of the deposits out of court to three of the directors of the South and Midland Company was

accordingly made on another petition being presented by them to the Lord Chancellor for that purpose. *Lewis v. Cooper*, 413

12. Plaintiff having brought eleven actions against eleven of the members of the provisional committee of a railway company, sued each separately for the same cause of action. A rule obtained by the defendant to stay proceedings in all the actions except such one as the plaintiff should elect, discharged. *Giles v. Tooth*, 678

13. The plaintiff having, by order of the solicitor, advertised the prospectuses of a projected railway company, and supplied them with newspapers, brought his action of debt against one of the provisional committee. The jury having found a verdict for the plaintiff:—*Held*, that there was no evidence that the person who employed the plaintiff had any authority, either express or implied, from the defendant to pledge his credit. *Cooke v. Tonkin*, 704

14. A projected railway company issued prospectuses, stating the proposed capital to be £1,000,000, in 40,000 shares of £25 each, and giving the names of the provisional directors, and the form of application for shares, which was to be made to the provisional committee of management. On the 7th of October the provisional committee passed resolutions, appointing a committee of management. On the 13th of October the defendant applied in the form given by the prospectus for shares, and on the 15th of December he received a letter of allotment. The receipt in blank at the foot of the letter was, "on account of the provisional committee." Between the time of defendant's application and the allotment to him, there had been a change in the members of the provisional committee, by the withdrawal of some names and the substitution of others.

In an action by the committee of management to recover the amount of the deposits:—*Held*, that, as the contract to take shares was made with the provisional committee, and not with the committee of management, the defendant was entitled to a nonsuit.

Quære.—Whether the change in the state of the Company between the application and allotment affected the contract?

Quære also.—Whether the proposal of the defendant was accepted under the circumstances in reasonable time? *Woolmer v. Toby*, 713

COMPENSATION.

See CONSTRUCTION OF STATUTES, 7.
INVESTMENT, 6.
TITHES.

By a Railway Act, 6 & 7 Will. 4, c. cxliii., a company are empowered to take lands, &c. making compensation to the owners, such compensation, in case of disagreement, to be assessed by a sheriff's jury. Sect. 27 provides, that, where the jury shall give a verdict for the same or a greater sum than shall have been offered by the Company for the purchase of land, or compensation for damage, the costs of the inquiry shall be defrayed by the Company, and that such costs shall be determined by the sheriff, and in default of payment may be recovered by distress. By sect. 37, the costs of deducing title to any lands purchased or taken by the Company for the purposes of the act, are to be borne by the Company; and, by sect. 38, in case of disagreement as to the amount, the same shall be ascertained by the Court of Exchequer, who may refer them to one of the Masters of that Court for taxation, and, after such taxation, may order the amount to be paid.

Semble, that sect. 27 only applies to a case where the Company compel the owner of property to sell, or accept satisfaction for damages, (see *Corregal v. The London and Blackwall Railway Company*, ante, vol. iii., p. 411), and not to the case of an owner, who, (under other sections of the act,) has given notice to the Company to take his property, and issued his precept to the sheriff to summon a jury to assess compensation.

But *held*, that an application for a mandamus by such owner, in such a case, was at all events premature, until the costs of the inquiry had been ascertained by the sheriff, and attempted to be levied by distress, and the costs of title taxed in the Court of Exchequer, being the specific modes pointed out by the act. *Reg. v. The London and Blackwall Railway Co.*, 119

CONSTRUCTION OF STATUTES.

See COSTS.
DAMAGES.
JURISDICTION, 4.
LAND, 4.
NOTICE TO LANDOWNER.
RATING, 2, 3.
SHARES, 2.
TITHES.

1. The Joint Stock Companies Act, 7 & 8 Vict. c. 110, s. 2, enacts, that, except where the provisions of that act are expressly applied to partnerships existing before the 1st of November, 1844, it shall be held to apply only to partnerships, the formation of which shall be commenced after that date.

A Railway Company was incorporated by an act (7 & 8 Vict. c. 59) before the 1st of November, 1844. Subsequently to that day, the Company resolved to make an extension

line, and, on the 30th of July, 1845, obtained an act for that purpose, 8 & 9 Vict. c. 38.

Held, that the latter undertaking was not a partnership the formation of which was commenced after the 1st of November, 1844, within the meaning of the 7 & 8 Vict. c. 110, s. 2. *Shaw v. Holland*, 150

2. The 7 & 8 Vict. c. 110, s. 26, enacting, "that until a joint-stock Company, formed after the 1st November, 1844, shall have obtained a certificate of complete registration, contracts for the sale of shares therein shall be void, and the persons entering into such contracts liable to a penalty," does not extend to railway companies, which cannot be carried into execution without obtaining the authority of Parliament. *Young v. Smith*, 135

3. The 7 & 8 Vict. c. 110, s. 26, enacting, that, "until a joint-stock Company, formed after the 1st of November, 1844, shall have obtained a certificate of complete registration, contracts for the sale of shares, or any interest therein, shall be void, and the persons entering into such contracts liable to a penalty," does not extend to railway companies, which cannot be carried into execution without the authority of Parliament. *Id.*

4. In an action for goods sold and delivered, the defendant pleaded, that the goods in question were scrip certificates of shares in a joint-stock company called "The Grand Union Railway Company," formed after the 1st of November, 1844, illegally sold by the plaintiff to the defendant, against the form of the statute, &c., and (after negating the exceptions in the 2nd section of the act) that the said joint-stock Company was formed after the 1st of November, 1844, and had not, before the sale obtained a certificate of complete registration:—
Replication: That the Company was

a Railway Company, for the purpose of making a railway, under the authority of an act to be obtained for that purpose, with the usual power to take lands, tolls, &c., and that the purposes thereof could not be carried into execution without the authority of Parliament, and was a Company within the proviso of section 2 of the above act, (setting it out,) and that within twelve months next before the sale the said Company was provisionally registered, and obtained a certificate thereof pursuant to the act.

Held, that the replication was a good answer to the plea, and that it was not necessary to state the execution of a railway to be the sole purpose of the Company.

And, to a similar plea that it was a good replication, that the Company was a company for executing a work which could not be carried into execution without the authority of Parliament, without stating the reason; as the Court would take notice, from the whole record, that it was a railway company.

And, that a plea founded upon the 26th section must negative the exceptions in section 2, and shew why the Company is such a one as requires to be registered under the act.

Such certificates of shares in a railway company may be declared on as goods sold. *Lawton v. Hickman*, 336

5. The 3 & 4 Will. 4, c. 42, s. 8, requires, that a plea of abatement for the nonjoinder of a co-defendant shall be verified by an affidavit, in which the residence of such a person shall be stated with convenient certainty:—
Held, that the word "residence" in this statute meant "home" or "domicile," and therefore that an affidavit, stating the residence of *A.* to be at a house, which, with the furniture, belonged to him, though it was then in the occupation of a friend till his re-

turn from abroad, where he was then travelling for a few months for the benefit of his health, sufficiently complied with the act. *Lambe v. Smythe*, 305

6. The plaintiff was the owner of a house near a public road, and connected therewith by an avenue and a lodge. A railway company deposited plans, &c., whereby it was shewn that they intended to cross the plaintiff's avenue 520 feet from the lodge, under a bridge raising the level of the roadway of the avenue only two feet, and by means of a cutting fifteen feet in depth.

The plaintiff, relying on the plans and sections, did not oppose the bill in Parliament, which accordingly passed into an act.

The railway company afterwards gave notice of their intention to deviate from the original plans, and to make their cuttings sixty-one feet nearer the plaintiff's house, and to make a bridge over his avenue seventeen feet high.

On appeal from the Court of Session in Scotland, an application by the plaintiff, for an interdict to prevent the Company from crossing the plaintiff's avenue in any other manner than that shewn by the original plans, refused, notwithstanding it was shewn that the measurements in the original plans had been miscalculated with reference to the datum line, and that the defendants' cuttings would, according to those plans, exceed the vertical powers of deviations given to the railway company.

Held, that parties are bound by what is represented on the deposited plans and sections, so far only as such plans and sections are incorporated in or specially referred to by the act.

That the Court will not regard what is done under the Standing Orders of the House, but will only look at the act itself.

That the plans are binding to determine the level of the railway with reference to the datum line, but not to the surface level of the land over or through which the railway passes. *The North British Railway Co. v. Tod*, 449

7. Plaintiff, owner of a piece of land through which a railway company by their plans and sections represented they intended to pass on an embankment so as to cross a public road on the level, filed a bill and obtained an *ex parte* injunction to restrain the Company from lowering or excavating the road or affecting the plaintiff's land in any manner inconsistent with the provisions of their act or the deposited plans or sections, or an agreement entered into by the plaintiff with the Company.

The Lands Clauses Consolidation Act having been incorporated with the special act, and the agreement referring to the latter act:—*Held*, that the Company were entitled to exercise all the powers given by the General and Special Act, although the plaintiff's bill and affidavits stated that the agreement was entered into on the understanding that the line would be made according to the plans and sections.

Semble, that, where a company are directed by their act to do a certain thing for the benefit of the public, in doing which they would be liable to pay compensation for injury to an individual right, they cannot bind themselves by any contract in respect of such individual right, so as thereby to defeat the intention of the Legislature. *Braynton v. The London and North Western Railway Co.*, 553

8. A railway company, without agreeing for the purchase of certain lands scheduled in their act, and without notice to the owners, under the 85th section of the Lands Clauses

Consolidation Act, deposited the value in the Bank, and delivered a bond, and were about to enter on the lands when the owners filed a bill and applied for an injunction:—*Held*, on appeal, affirming the decision of the Vice-Chancellor of England, that the Company were right in their proceedings, and no injury being alleged, the application was refused with costs. *Bridges v. The Wilts, Somerset, and Weymouth Railway Co.*, 622

CONTRACT.

See AGREEMENT.

COMMISSIONERS.

CONSTRUCTION OF STATUTES, 7.
DIRECTORS.

By a resolution of the London and Brighton Railway Company, the directors were empowered to raise £300,000 by an issue of loan notes, payable at the end of five years, bearing interest in the meantime, with an option to the holders to convert them, at the expiration of not more than three years, into quarter shares, under an act to be obtained for that purpose. The directors published an advertisement to the above effect, and thereby fixed the 10th February, the 15th April, and the 15th July, for payment of the instalments of the sums allotted, and interest was to commence from the time of payments. On payment of the whole sum, the Company delivered to the payer a loan note, whereby they promised to pay the bearer £100, and interest half-yearly on the 15th August and 15th February; and on this note was an indorsement, stating that an application was intended to be made to Parliament for an act, under the terms of which the bearer would be entitled on 15th February, 1845, provided previous notice should be given, to convert his loan note into quarter shares of the Company.

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An act was obtained, and thereby the directors were empowered, by an order of a general meeting, to raise sums sufficient to pay off money borrowed, the sums raised to be divided into distinct shares, and to be appropriated as by the order of such meeting should be determined. By a general meeting the shares authorised by the act were ordered to be raised and allotted among the holders of loan notes, in the manner and on the terms directed by the act.

The plaintiffs did not declare their option until June, 1845; but, nevertheless, claimed to have shares allotted to them in exchange for their loan notes, and, on the Company refusing, filed their bill:—*Held*, that the original contract between the parties was not varied by the subsequent act and resolution.

That the plaintiffs, not having protested against the indorsement, nor given notice of their desire to convert their loan notes into shares until the day for declaring that option had passed, were not entitled to have shares allotted to them in exchange for their loan notes. Bill dismissed, with costs. *Campbell v. The London and Brighton Railway Co.*, 475

CONTRACTORS.

See COMMISSIONERS, 1.

COSTS.

See BILL OF COSTS, 1.

COMMITTEE, 2.

COMPENSATION.

INVESTMENT, 1, 3, 4, 5.

JURISDICTION, 3.

By the 5 & 6 Will. 4, c. 107, the Company were empowered to construct a railway, and to convey upon it such goods as should be offered to them for that purpose, and to make such reasonable charges as they might from time to time determine upon.

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By sect. 223 it was enacted that no action, &c. should be brought, &c. against any person for anything done in pursuance of the act, or in execution of the powers thereof, unless twenty days' previous notice, in writing, should be given to such person. By the 2 Vict. c. 27, s. 24, it was enacted that the charges by the said act authorised to be made should be charged equally to all persons:—*Held*, that the taking of toll by the Company was an act done in the execution of the powers of their act, and that, in assumpsit against them to recover the amount of certain overcharges, they were entitled to notice of action, for which, however, the plaintiff, having succeeded, was entitled to charge, although that charge was not included in the amount indorsed on the writ. *Kent v. The Great Western Railway Co.*, 699

COVENANT.

In a declaration in covenant, the plaintiffs stated, that the defendants, a Railway Company, demised to them certain refreshment rooms at Swindon, for ninety-nine years, at the yearly rent of 1*d.*, and that the plaintiffs covenanted to complete, keep in repair, and insure the said rooms; that the defendants covenanted that, in case the rooms should be disused as the regular and general place of stoppage for the refreshment of passengers, they would purchase the buildings of plaintiffs, on certain terms; that it was by the said indenture declared to be the intention of defendants, and the understanding of the plaintiffs, that all trains conveying passengers, not being goods' trains, or trains to be sent express or for special purposes, or trains not under the control of the defendants, which should pass the Swindon station, up or down, should stop there for the refreshment of passengers for a reasonable time of

DAMAGE—DAMAGES.

about ten minutes; and that the defendants did, by the said indenture, covenant and engage with the plaintiffs not to do any act which should have an effect contrary to the above intention. Breach, that while the Swindon station was used as the regular and general place of stoppage for refreshment of passengers, the defendants caused divers trains carrying passengers, being trains under the control of defendants, and not express trains, &c., to pass the Swindon station, both up and down, without stopping there for the refreshment of passengers, for a reasonable period of about ten minutes, or any other reasonable period, and caused the said trains to stop there for a short and unreasonable period, to wit, one minute, and no more, not being sufficient to enable the passengers to obtain any refreshment there.

Held, on demurrer, that the declaration of the above intention, taken in conjunction with the rest of the indenture, amounted to an absolute covenant by the defendants, that the arrangements for trains to stop at Swindon should continue as long as the Company chose to make it the general place of stoppage for refreshments.

And that a good breach was assigned, although it was not stated that there were passengers in the train desirous of having refreshments, and who gave notice thereof. *Rigby v. The Great Western Railway Co.*, 190 S. C. in equity, 491

DAMAGE—DAMAGES.

See SHARES, 1.

By a railway act, 5 & 6 Will. 4, c. 107, s. 223, it is provided, that no action shall be brought against any person for anything done, or omitted to be done, in pursuance of the act, unless such action shall be commenced

DEBENTURES.

within six months next after the act committed, or, in case there shall be a continuation of the damage, then within six months next after the committing such damage shall have ceased.

By a subsequent act, the Company are authorised to alter the course of a canal, provided that if, in the execution of the works, the canal shall be obstructed, the Railway Company shall pay to the proprietors of the canal £10 an hour as liquidated damages during the continuance of the obstruction, and, in default of payment of such sum on demand, the proprietors may recover the same in an action of debt.

The railway company in the execution of their works obstructed the canal in 1840, and June, 1841. In May, 1842, the proprietors of the canal made a demand on the railway company for the penalties for the two obstructions, the last of which they described in their demand as having ceased on the 11th of June, 1841. In July, 1842, they brought an action for the said penalties.

Held, that the action was not brought in time, as the limitation of six months for bringing the action began to run from the ceasing of the obstruction, and not from the demand and non-payment of the penalties. *The Company of Proprietors of the Kennet and Avon Canal Navigation v. The Great Western Railway Co.*,
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DATUM LINE.

See CONSTRUCTION OF STATUTES, 6.

DEBENTURES.

The Great Western Railway Company issued to the plaintiffs debentures, in the following form:—
“We, the Great Western Railway Company, in consideration of £1000 to us paid by T. P. and W. G., do assign unto them the said undertak-

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ing, and all the estate, &c., to hold the same until the said sum of £1000, together with interest for the same after the rate of £5 for every £100 for a year, payable as hereinafter mentioned, shall be fully paid. And it is hereby stipulated that the said principal sum of £1000 shall be payable and paid on the 15th of January, 1844, and that in the meantime the said Company shall, in respect of interest as aforesaid on the said principal sum, pay to the bearer of the coupons or interest warrants hereunto annexed, the several sums mentioned in such warrant respectively, &c.” In January, 1844, the interest due on the bonds up to the 15th of January, 1844, was paid to the plaintiffs. The Company did not then pay, nor did the plaintiffs then require, the principal, nor did the Company give to the plaintiffs notice that they were ready to pay it:—*Held*, that these debentures continued to carry interest from the 15th of January, 1844, until payment. *Price v. The Great Western Railway Co.*,
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DEMAND AND REFUSAL.

See BRIDGE, 1.

DEMURRER.

See ACTION AT LAW.

COMMITTEE, 2, 3, 8, 9.

JURISDICTION, 4.

PROMOTER.

1. The provisional committee of the Southampton and Dorchester Railway Company entered into an agreement with the Great Western Railway Company for granting them a lease of that line, but afterwards, with the sanction of the Board of Trade, and of the Great Western Railway Company, rescinded their agreement with the last-mentioned Company,

and entered into a similar one with the South-western Railway Company. At the time of this arrangement, it was agreed that the Great Western Railway Company should give up all interference with the Southampton and Dorchester line, and that the South-western Railway Company should subscribe for all the shares then unappropriated (6500, for which the South-western Railway Company subscribed), and that clauses should be inserted into the Southampton and Dorchester act, for combining the independence of that Company with a reasonable control over the manner of constructing the works by the South-western Railway Company.

Certain clauses were submitted, with the approbation of the South-western and the Southampton and Dorchester Companies, for insertion in the Southampton and Dorchester bill, limiting the amount to be subscribed for by the South-western Railway Company to £330,000, until an increase should be made in the capital, and giving the South-western Railway Company the appointment of four directors out of their own body; but these clauses were struck out by the Committee of the House of Commons, on an objection arising out of the standing orders. One of the shareholders in the Southampton and Dorchester Company filed a bill, on behalf of himself and all other the shareholders of the said Company, except such as were defendants thereto, and such as had contracted to sell shares to the South-western Railway Company, against the South-western Railway Company, and the Southampton and Dorchester Railway Company, alleging, that, in violation of the understanding between the parties, the South-western Railway Company had contracted to purchase such a number of the shares of the Southampton and Dorchester Railway, be-

yond the 6500 originally subscribed for, as would destroy the independence of that Company, and praying the interference of the Court.

Held, upon a demurrer for want of equity and for want of parties, 1st, that the Great Western Railway Company were necessary parties; 2ndly, that those shareholders in the Southampton and Dorchester Company who had agreed to sell their shares to the London and South-western Company were necessary parties; and, 3rdly, that the London and South-western Company were entitled under their agreement to 6600 shares, and not to 6500 only, as in the bill mentioned. Demurrer allowed, with liberty to amend. *Greathed v. The South-western and The Southampton and Dorchester Railway Companies*, 213

2. A shareholder in a Company advertised to be formed for the purpose of carrying out a line projected by A., filed his bill, on behalf of himself and all other shareholders in that Company, except the defendants, against all the members of the provisional committee, alleging that they had abandoned their project in favour of one projected by B., and also alleging various acts of misconduct and waste of the Company's monies; and praying for various accounts, a receiver, and an injunction.

Demurrer to this bill for want of equity and for want of parties, overruled without prejudice; and costs, with consent of the plaintiff, reserved. *Wilson v. Stanhope*, 251

3. The plaintiff, who was a shareholder in a projected railway company, but who had refused to pay £100, a sum fixed by the executive committee as his share of the expenses incurred, filed his bill to restrain a creditor of the Company from prosecuting an action at law against him to recover a debt, in the bill stated to have been assigned to the committee,

in order that they might use it as a means of compelling payment of the £100, and also to restrain the executive committee of the Company from commencing any action against him or parting with the deposits in their hands, except in payment of the liabilities of the Company; and praying that accounts might be taken of the assets and liabilities, plaintiff offering to pay what might properly be found due by him.

The managing committee (all of whom, together with the creditor, were defendants) demurred for want of equity and for want of parties:—*Held*, that, although a plaintiff may have a good defence to an action at law, he is not on that account precluded from proceeding in equity to restrain the action.

That the defendants must distribute the assets in their hands in discharge of the liabilities of the Company, and were not justified in attempting to extort by means of an action an arbitrary sum which the directors had fixed as plaintiff's share of the expenses. Demurrer overruled. *Fernihough v. R. Leader*, 373

4. A bill was filed by five shareholders in a provisionally registered Company on behalf of themselves, and all other shareholders except the defendants, against the provisional committee, praying that it might be declared that the objects of the Company had failed through the neglect and misconduct of the defendants, and that various accounts might be taken, and the funds in court applied in discharge of the joint liabilities of the partnership, and also that the residue of the deposits might be paid to the plaintiffs and other shareholders.

The bill stated (amongst other things) that, at a meeting called pursuant to a resolution of the House of Commons, the defendants had, by undue means, procured a majority in

favour of their proceedings in Parliament, and brought in a bill for the formation of a part only of the original line; and that, in order to comply with the Standing Orders, 955 shares had been nominally subscribed for. It was, however, charged that the names of such subscribers were unknown to the plaintiffs, although it was stated, in another part of the bill, that each subscriber to the Parliamentary contract (a copy of which had been taken by the plaintiffs) must affix thereto his name, address, and description.

To this bill the defendants demurred, for want of equity and parties generally; misjoinder of plaintiffs; and also because no parties to represent the majority at the meeting were before the Court:—*Held*, by Lord Chancellor, affirming the judgment of Vice-Chancellor *Knight Bruce*, that the demurrer must be overruled. *Apperley v. Page*, p. 568, and *Cooper v. Webb*, 582

DEPOSIT.

See ALLOTTEE.

COMMITTEE, 2, 10, 11.

1. A railway company (whose bill, at the close of a session of Parliament, was before a Committee of the House of Lords) sought, by petition, to get the deposit, lodged by them in the Bank of England previously to such session, paid out to one of the five directors in whose names the deposit had been made:—*Held*, that this case came within the alternative contained in the 4th section of the 1 & 2 Vict. c. cxvii.; and the order was made for payment to the five directors, it not appearing that the one director named in the prayer of the petition had been legally appointed to receive it. *Wilkinson, Ex parte*, 78

2. Five of the directors of a projected railway company, by petition, prayed the payment out of court of a

large sum, standing in their names in the Bank of England, which had been paid in by them in compliance with the Standing Orders, to two bankers and two gentlemen (not petitioners). The order was made according to the prayer. *Boston and Sheffield Railway, Ex parte*, 230

3. An order was made by the Vice-Chancellor of England, on petition, for payment to certain persons of a sum of money, deposited on behalf of a projected railway company in compliance with the Standing Orders of the House of Commons, but on bill filed stating circumstances which would render it improper that such payment should be made, an injunction to restrain the parties from receiving the sum deposited was, notwithstanding the order, granted by *Knight Bruce, V. C. Castendieck v. De Burgh*, 386

DIRECTORS.

See COMMITTEE.

JURISDICTION, 4.

The managing directors of a railway company, with the view of increasing the traffic on their line, entered into a contract with a Steam Packet Company, that they would guarantee the proprietors of the Steam Packet Company a minimum dividend of £5 per cent. on their paid-up capital until the Company should be dissolved, and that, upon a dissolution, the whole paid-up capital should be returned to the shareholders in exchange for a transfer of the assets and properties of the Steam Packet Company.

One of the shareholders filed a bill, on behalf of himself and all other shareholders who should contribute, except the directors, against the Company and the directors, and obtained an injunction, *ex parte*, to restrain the completion of the contract.

INFANT.

Held, on motion to dissolve this injunction, that an objection for want of parties to a suit so framed was not sustainable. That directors have no right to enter into or to pledge the funds of the Company in support of any project not pointed out by their act, although such project may tend to increase the traffic upon the railway, and may be assented to by the majority of the shareholders, and the object of such project may not be against public policy. That acquiescence by shareholders in a project for however long a period affords no presumption that such project is legal. *Colman v. The Eastern Counties Railway Co.*, 513

DRAINAGE.

See COMMISSIONERS, 2.

ENGINEER.

See COMMITTEE, 1, 4.

EXPRESS TRAINS.

See COVENANT.

INJUNCTION, 1.

INFANT.

1. The guardian of an infant plaintiff, whose lands were intersected by railways and waggon-ways, from which he received a considerable rental, applied to certain Companies to insert in the bills they were applying for in Parliament a clause to the effect, that, in case of their taking any part of plaintiff's land, they would compensate him for the loss or diminution in profit consequent on the traffic being transferred from the plaintiff's railways and waggon-ways to those of the Company. The Company having neglected to comply with this application, the plaintiff, by his guardian, presented a petition (in accordance with the finding of the Master) pray-

ing that he might be allowed to oppose the bill in Parliament, unless the insertion of such a clause as had been proposed to the Company, or some other arrangement to be sanctioned by the Master, should be agreed upon by them. The order was made as prayed. *Monypenny v. Monypenny*, 226

2. M. & B., sharebrokers, the holders of certain railway shares, registered in the name of J. K. D., sold them by their agents to S. & Co., on account of H. The purchase-money was paid to M. & B., and retained by them in liquidation of a debt alleged to be due to them from J. K. D. previously to the sale. Certificates of the shares and a transfer deed, dated June, 1842, were delivered to Messrs. S. & Co., by M. & B., but on application by H. to the Railway Company to be registered, they refused, on the ground that they had received notice that J. K. D. was a minor at the time when he executed the transfer deed.

S. & Co. filed a bill against M. & B. and J. K. D., and his father, not alleging that M. & B. were cognisant of the nonage of the son, but charging that he was of age, and that M. & B. held him out to be and considered him of full age.

The bill prayed relief on the ground of fraud, but no case of misrepresentation on the part of J. K. D., or of his acquiescence after becoming of age, was established on the pleadings.

Held, that the bill be dismissed without prejudice to any other action or suit, and without costs as to the son, with costs as to the father, and, under special circumstances, with £10 costs as to M. & B.

Quare, whether, if an objection had been taken on the ground that H. was not a party, it would not have been allowed. *Stikeman v. Dawson*, 585

INJUNCTION.

See ACTION AT LAW.

COMMISSIONERS, 2.

COMMITTEE, 10, 11.

CONSTRUCTION OF STATUTES, 7, 8.

COVENANT.

JURISDICTION, 1, 4.

LAND.

NOTICE TO LANDOWNER.

1. The defendants, the Great Western Railway Company, in consideration of the costs and expenses incurred by the plaintiffs in building refreshment and other rooms at Swindon, granted them a lease for ninety-nine years, at a nominal rent, which contained covenants on the part of the lessee to maintain the refreshment-rooms, &c. in a suitable manner; and on the part of the Company, that no general refreshment-rooms, other than those erected by the plaintiffs, and those at the terminal stations of the railway, should be erected by the Company; and that, in case the Swindon station should become disused, the Company should purchase back the plaintiffs' buildings on certain terms; and in the said lease was contained the following clause:—"And it is hereby declared to be the intention of the said Company, and the understanding of the said plaintiffs, that, in consequence of the outlay to be incurred by them in erecting the said refreshment-rooms at Swindon, and preparing such other works as aforesaid, the Company shall give every facility to the said plaintiffs for enabling them to obtain an adequate return by means of the rents and profits to be derived from the said refreshment-rooms, and that all trains carrying passengers, not being goods trains, or trains to be sent express, or for special purposes, and except trains not under the control of the said Great Western Railway Company,

which shall pass the Swindon station, either up or down, shall, save in case of emergency or unusual delay arising from accidents, stop there for refreshment of passengers for a reasonable period of about ten minutes; and that, as far as the Company can influence the same, trains not under their control shall be induced to stop for the like purpose, and the Company engage not to do any act which shall have an effect contrary to the above intention."

The plaintiffs underlet the premises to G. for seven years, and entered into a covenant with him for quiet enjoyment; and further, that they would, during the continuance of the term granted to him, do all such acts and things as should be necessary and proper for enforcing the fulfilment and performance of the covenants entered into by the Company with the plaintiffs.

Certain trains belonging to the Company, called "express" trains, passed the Swindon station, without stopping a sufficient time to allow the passengers to get refreshment.

The plaintiffs, without the assent of their sub-lessee, filed a bill against the Company, and moved for an injunction.

Two actions, directed by the Court for the purpose of establishing the facts of the case, having been decided in favour of the plaintiffs,

Held, that the plaintiffs had a sufficient interest to entitle them to carry on the suit. That the Court will not consider the question of convenience to the public or the Company, but, in a case like this, will treat the Company as individuals. That, in a case in which it would be impossible accurately to measure in damages the loss from a breach of covenant, and the plaintiffs can only recover such speculative damages as a jury may give them in repeated actions, a court of

equity will interfere by injunction to protect the plaintiffs' right to the specific performance of the covenant.

That, where mutual rights of parties rest in covenant, each party is entitled, *prima facie*, to enforce his rights in respect of any covenant broken, either in a court of law or equity, notwithstanding such party may, at the time, be liable in respect of other covenants.

That the trains called "express" trains in the train bills of the Great Western Railway Company, do not come within the exception contemplated by the above covenant. *Rigby v. The Great Western Railway Co.*,
175

2. The Court below having granted an injunction pending the decision of a case sent for the opinion of a court of law:—*Held*, by the Lord Chancellor, on motion to dissolve the injunction, that the plaintiffs' equity depending on the legal effect of a covenant, they had no *locum standi* in a court of equity to apply for an injunction; that in cases of this sort it is the duty of the Court to put matters in a course of legal inquiry, in order to establish the validity of the legal right before it grants an injunction, and in the meantime to make such order as will secure to either party what he may ultimately be found entitled to.

That, as the loss in one case could be ascertained, but the loss in the other, if the injunction continued, could not be ascertained, or compensation given, the injunction should be dissolved, the Company undertaking to pay such sum of money, by way of damage, as the Court should direct, and giving security.

Where the interference of the Court depends on a disputed legal right, the Court will not leave it to the option of a defendant to prepare a case or not, as he may think proper, for the

purpose of taking the opinion of a court of law ; but, for its own security, will order a case to be prepared, to be settled by the Master, if parties differ.

Ib. 491
S. C. at law, 190

INQUISITION.

See COMPENSATION, 1.

INVESTMENT.

1. The Great Western Railway Company were, by a clause in their act, compelled, if they took any part of the glebe belonging to the vicarage of Twiverton, to take *the house* also ; and the vicar and patrons for the time being were empowered, on petition by them to the Court of Exchequer, with the consent of the ordinary, to lay out any part of the purchase-money in purchasing or erecting a new vicarage-house ; but the act did not declare by whom the costs of getting the money out of court for this purpose should be defrayed :—*Held*, that the Railway Company were not liable for the “costs, charges, and expenses” of getting the money out of court for the purpose of *building* the new vicarage-house, and that the sections of the act generally declaring the Company liable to the costs, &c. of money taken out of court, apply only to the cases in which such money is to be re-invested in the manner *specifically* declared by the acts of Parliament. *Ex parte Madon*, 49.

2. Where, by the prayer of a petition, the required parliamentary deposit of a railway company is sought to be invested in Exchequer bills, the Court will give the parties liberty to lay out the same in any of the parliamentary stocks appointed by the Accountant-General, or in Exchequer bills from time to time, as may be most convenient to the parties. *Re*

The Manchester, Huddersfield, and Great Grimsby Railway Co., 204

3. A tenant in tail, on attaining his majority, barred the entail in certain monies, the produce of land sold by his guardian to the Great Western Railway during his minority, and presented a petition to the Court for the payment to him of the purchase-mones, and of the costs, charges, and expenses incident to the application. The order was made as prayed. *Ex parte Marshall*, 58

Lord Palmerston, Ex parte, 57, (n.)

4. The devisees in trust under the will of J. S. R. presented a petition to the Court, praying that a sum of money paid in by a railway company, together with another sum held by them for a like purpose, might be invested in the purchase of certain closes of land of the value of the amount of the two sums, and also praying the taxation and payment by the Company to the petitioners of the costs, charges, and expenses attending the purchase :—*Held*, that, under the act of Parliament, the petitioners were not entitled to any such costs, charges, or expenses, nor to the costs of the application. *Ex parte Tetley*, 55

5. Where purchase-money of land taken by a railway company is in court, to be invested in the purchase of other land, the Court will allow all costs, charges, and expenses, according to the act, of as many investments as may be necessary to consume the whole purchase-money. *Ex parte Bouverie*, 229

6. Rector of L., seised in right of his office of certain houses taken by a railway company under the powers of their act, applied by petition for the investment of a sum of money which had been paid by the railway company for compensation, and for the reversion, and thereby prayed for payment of the dividends to the peti-

tioner and his successors. It appearing that the houses in question were subject to leases, of which about thirty years were unexpired, at a nominal rent, the Court refused to make the order as prayed, but directed the investment and accumulation of the sum, with liberty to apply. *Ex parte The Rector of Lambeth*, 231

7. Where a sum of money is in court to be invested in land, the Court will order a reference as to a proposed investment, but will refuse to make any prospective order as to any other investment in the event of the one proposed being rejected. *Ex parte Pumfrey*, 490

8. On a petition for investment of purchase-money of lands taken by a railway company, and payment of dividends to tenant for life, the Court will not, even under special circumstances, dispense with the usual affidavit of the petitioner as to goodness of title, &c. *Ex parte Hollick*, 498

JOINT STOCK COMPANIES.

See CONSTRUCTION OF STATUTES, 1, 2, 3.

JOINT STOCK COMPANY.

Assumpsit for money had and received. Plea as to 94*l.* 2*s.* 6*d.*, that, after the passing of 7 & 8 Vict. c. 110, defendant, as the broker of the plaintiff, sold on his account fifteen shares in the Boston &c. Railway Company, for 94*l.* 2*s.* 6*d.*, which Company was a joint-stock company within the provisions of the said act, that is to say, a partnership whereof the capital was agreed and intended to be divided into shares, &c., and not being a banking company, &c., (negating the excepted cases in the enacting part of sect. 2 of the statute), and that the said sum was money received by the defendant for the plaintiff, as the proceeds of such sale; that,

at the time of such sale, the said Company had not been completely registered, and that no act of Parliament had been obtained on behalf of the said Company: — *Held*, that such plea was bad, for not shewing that the Company was a Company formed for the execution of works which could be carried into execution without the authority of Parliament, and not within the proviso of the second section. *Semble*, that if the sale were illegal, the defendant could not set up that defence to this action. *Bousfield v. Wilson*, 687

JURISDICTION OF COURTS OF EQUITY.

See BILL OF COSTS.
DEMURRER, 3.
DEPOSIT, 3.

1. On a bill filed, supported by affidavit, charging the managing committee of the Warwick and Worcester Railway Company with misconduct and mismanagement, the plaintiffs obtained an injunction *ex parte* to restrain some of the defendants and certain other persons, not defendants to the bill, from acting on an order for payment out of court to them of a sum deposited by them in the name of the said Company; but, on motion to dissolve that injunction, it appearing that a portion only of the sum deposited had been contributed by the Warwick and Worcester Company, and the remainder by two companies with which the Warwick and Worcester Company had amalgamated, but against which the bill sought no relief: — *Held*, that the injunction as to the portion of the fund contributed by the Warwick and Worcester Company should continue, but should be dissolved as to the portion contributed by the other two companies.

That, although the words of the 4th section of the 1 & 2 Vict. c. 117,

are imperative, yet the inherent authority in a court of equity to repress fraud and to exercise control over trustees, empowers it to look into the circumstances, and to decide whether the command of the Legislature ought or ought not to be complied with. *Goodman v. De Beauvoir*, 380

2. The assignees of A., and B. (a creditor of A.), made opposing claims to a sum of money due from a railway company for work done by A. The assignees having brought an action against the Company to recover it, the railway company paid the sum due by them into court. The assignees proceeded to stay their action with a view to obtain the payment to themselves of the sum in court; whereupon the Company filed a bill in equity, and applied for an injunction:—*Held*, that this was not a case for the interference of a court of equity. *The Great Western Railway Co. v. Cripps*, 473

3. The Court has no power, under the Lands Clauses Consolidation Act, to order payment of the costs of deducing the title, and of the conveyance of lands to a railway company. *Ex parte The Marquis of Bath*, 567

4. A bill was filed by four persons describing themselves as shareholders of a Company, alleging that, under the construction of certain acts of Parliament, twelve directors ought on a certain day to have ballotted out four, or nominated four of their body to retire in rotation, and to have elected four others in their places, and that not having done so, the whole twelve had become disqualified, and ceased to be directors: and the bill prayed that they might be restrained from voting or acting as the directors of the Company, and might be ordered to give up the control and seal of the Company to six directors, who had been appointed in addition to the twelve original directors, under a power in

the act enabling the Company to increase the number of directors to eighteen. The bill did not contain any allegation that the Company had not the power or had refused to file a bill, or that the plaintiffs had an interest in the suit which was not common to the rest of the shareholders:—*Held*, by the Lord Chancellor, overruling the decision of his Honor the Vice-Chancellor of England, that there was nothing to induce the Court to relax the established rule, that one or two shareholders in a Company cannot be permitted, in their own names only, to institute a suit in respect of a subject common to and for the benefit of all the shareholders.

That, in a case like the present, the Company are the proper parties to file a bill, and not a few of the shareholders. The judgment in *Foss v. Harbottle* approved.

That the Court of Chancery has no jurisdiction to determine a question which wholly depends on whether certain persons are or are not entitled to the corporate office they claim to hold.

Demurrers allowed, with costs. *Mozley v. Alston*, 636

JUSTICES.

See BRIDGE.

LAND—LANDOWNER.

See COMPENSATION.

CONSTRUCTION OF STATUTES, 6, 8.

INFANT, 1.

INVESTMENT.

NOTICE TO LANDOWNERS.

1. Before the amount to be paid by a railway company, for land required by them for the purposes of their railway, had been determined, a verbal consent, by one party stated to be qualified, by the other alleged to be general, was given, whereupon the

Railway Company entered upon the land, and commenced works which would permanently affect it:—*Held*, that the Court will not interfere by injunction to stop the works, if perfect justice can be done, by compelling the Company to pay for the land; but will order the proximate value to be deposited until the amount be determined. *Langford v. The Brighton, Lewes, and Hastings Railway Co.*, 69

2. A railway company entered upon land and drew a trig line along it, without the consent of and without having given any notice to the owner, whereupon he filed his bill and applied for an injunction. The Company having stated that they entered upon the land solely for the purpose of making a survey, and that they did not intend to proceed any further without giving the requisite notices, the Court refused to make any order on the motion, but reserved the costs. *Fooks v. The Wilts, Somerset, and Weymouth Railway Co.*, 210

3. Plaintiffs were the owners of very extensive mills and other factories necessary for carrying on their business of cotton-spinners, and also were possessed of all the lands adjacent thereto, and lying within the limits of deviation required by a railway company for the formation of their proposed line. The plaintiffs, apprehending that, if the intended railway should be made in the manner proposed, their property would be materially injured, presented their petition and opposed the bill in committee. The committee having refused to proceed unless some compromise were entered into by the Company with the plaintiffs, the following clause was agreed upon:—"Whereas John Gray and William Gray are the owners and occupiers of certain mills, lands, and buildings, situate at Darcy Lever, through which the lines of the railway, as delineated on the plans and

sections before referred to, pass, be it enacted that it shall not be lawful for the said Company, without the consent of the said John Gray and William Gray, or the owners or owner for the time being of the said mills, lands, and buildings, to construct the said railway nearer to the same mills, lands, and buildings, or any of them, than the south-east end of Lever Bridge delineated on the said plans and therein numbered (1)."

Upon the insertion of this clause, the plaintiffs withdrew their opposition, and the bill passed into an act. The Company having given notice to the plaintiffs that they intended to proceed in the formation of their railway through their property, but in a different line to that originally proposed, the plaintiffs filed their bill and moved for an injunction.

Held by the Master of the Rolls, that, on the construction of the clause, the Company had no right to make the railway through the plaintiffs' lands until they had entered into an agreement with them, and that they were entitled to an injunction, which was accordingly granted.

Held by the Lord Chancellor, on appeal, that, as the question involved a question of law, and the defendants required it, the Court was not justified in deciding the right to a perpetual injunction without giving them an opportunity of having the opinion of a court of law.

That the motion should stand over, and the injunction in the meantime be continued, plaintiffs undertaking to proceed immediately to the trial of the legal question. *Gray v. The Liverpool and Bury Railway Co.*, 235

4. The defendants, a railway company, obtained an act for making certain branch railways, and it was thereby provided that nothing therein contained should extend to prejudice, diminish, alter, or take away any of

the rights, privileges, powers, or authorities vested in the plaintiffs (also a railway company) under their act, but all rights, privileges, and franchises of the said Company, and all the powers, authorities, and provisions in the said last-mentioned act contained, were saved and reserved to them as if the defendants' act had not been passed: so always nevertheless that such rights, privileges, franchises, powers, authorities, and provisions, be not exercised in such a manner as to prevent the defendants from compulsorily taking and using land of sufficient breadth to admit of the formation of the extensions or branches thereinbefore authorised; such extensions or branches, however, not to exceed respectively twenty-two feet in breadth at the level of the rails, with sufficient breadth for the necessary slopes.

The plaintiffs were empowered by their act to take certain lands compulsorily, and also to take certain other lands with consent. The defendants had power to take compulsorily certain lands scheduled in their act, amongst which were certain pieces of land which the plaintiffs had purchased with the consent of the owners subsequently to the date of the defendants' act.

The defendants gave notice of their intention to take, under their compulsory powers, a greater quantity of the pieces of land purchased by the plaintiffs than was required for the line of their railway for stations, &c., whereupon the plaintiffs filed a bill and applied for an injunction to restrain the defendants from taking more of their land than was necessary for their line of railway.

Held, that the plaintiffs, having occupied the ground before the defendants, were entitled to hold so much of it as was not actually wanted for the formation of the defendants' railway.

Injunction granted, with liberty to plaintiffs to bring action to try the legal right. *The Lancaster and Carlisle Railway Co. v. The Maryport and Carlisle Railway Co.*, 504

LIABILITY (OF PROVISIONAL COMMITTEE).

See COMMITTEE.

LIEN.

See COMMITTEE, 2.
PROMOTER.

LOAN NOTES.

See CONTRACT.
DEBENTURES.

MANDAMUS.

See BRIDGE.
COMPENSATION, 1.

NEW TRIAL.

See ALLOTTEE, 3.

NOTICE.

See COMMITTEE, 3.
CONTRACT.
DAMAGE.

NOTICE TO LANDOWNERS.

See CONSTRUCTION OF STATUTES, 8.
LANDOWNER, 1, 2.

1. A railway company gave notice to a landowner, that they intended to take a certain portion of his land under the powers of their act, for the purposes of their railway, which notice they alleged, and on the pleadings it was admitted to be invalid. The Company subsequently gave a second notice, that they should require twenty perches of land, but before anything was done on either side, they gave a notice of withdrawal of their second notice, and then served a third notice on the plaintiff, whereby they stated that they required one

perch only of the plaintiff's land. The plaintiff filed a bill, and moved for an injunction to restrain the Company from proceeding on the last notice:—*Held*, that the withdrawal of the second notice by the Company not having been assented to by the plaintiff, that notice constituted a binding contract on the Company, and the last notice must be treated as a nullity. *Tawney v. The Lynn and Ely Railway Co.*, 615

2. A railway company were empowered by their first act to take compulsorily certain lands for the purposes of their act, but were limited to twenty-two yards in width, except for purposes therein specified. The Company agreed with the plaintiffs for a ~~certain~~ portion of their lands, and the price was fixed by arbitration; they subsequently obtained two acts of Parliament, by one of which they were empowered to ~~erect~~ a station, and the powers of taking land given by the first act were extended to those acts, which, however, did not contain any new schedules. The Company, who had already taken twenty-two yards for their railway, served notices on the plaintiffs slightly differing from each other, but sufficiently clear to identify the lands, and thereby required the rest of the plaintiffs' land comprised in the schedule to the first act, "under the authority of that and their two subsequent acts, or one of them;" but such notices did not state the purposes for which the land was required.

The plaintiffs filed a bill and applied for an injunction to restrain the Company from taking any further portion of their land:—*Held*, that the Company had not, by taking the land for their railway, exhausted the powers of the first act, so as to preclude them from taking more land for their station, and it being shewn by affidavit that the land was required

for a station, plaintiffs' application refused with costs. *Simpson v. The Lancaster and Carlisle Railway Co.*, 625

OBSTRUCTION.

See DAMAGE.

PARLIAMENTARY DEPOSIT.

See INVESTMENT, 2.

PARTIES (TO BILL).

See ACTION AT LAW.

COMMITTEE, 2, 8.

DEMURRER, 1, 2, 4.

DIRECTORS.

JURISDICTION, 4.

PARTNERSHIP.

See COMMITTEE, 7.

CONSTRUCTION OF STATUTES, 1.

PLANS AND SECTIONS.

See CONSTRUCTION OF STATUTES, 6, 7.

LANDOWNER, 3.

PLEA. (*At Law*).

See ALLOTMENT, 1.

COMMITTEE, 6.

CONSTRUCTION OF STATUTES, 4, 5.

JOINT STOCK COMPANY.

(*In Equity*).

A. and B., on behalf of themselves and all other shareholders of a company provisionally registered, except the defendants, filed a bill against eighteen of the managing committee for an account of the expenses, and for a division thereof, rateably, on each share, and for a return of the residue to the shareholders; and also for payment of the deposits on shares reserved by the defendants, and that they might be decreed to make good all loss occasioned by their mismanagement; and also for an account of

the assets, and debts and liabilities, and for a receiver and injunction.

To this bill one of the defendants pleaded in bar, that B. had assigned his shares and interest to C.

Held, that the plea was good in substance, inasmuch as a state of circumstances which would prevent B., if sole plaintiff, from obtaining relief at the hearing, would not, on account of A. having a present interest, sustain the bill against a demurrer.

That, although the plea admits the allegations of a bill to be true, yet, if the bill do not shew a case under which one plaintiff would be entitled to relief, notwithstanding the assignment of his shares, and without reference to another plaintiff, the plea will be held good.

That, no case of liability being made by the bill, an allegation to that effect, raised by the argument, and only arising by implication from the circumstances stated, will not be held sufficient to sustain the bill.

That B., having assigned his shares, cannot, in the character of trustee, represent his assignee C., nor the absent shareholders on behalf of whom he professes to sue.

The plea in this case being too general in form, and not sufficiently detailing the particular transaction on which the plea was founded, the Court gave leave to amend, and reserved the costs. *Doyle v. Muntz*, 422

POWERS (COMPULSORY AND PERMISSIVE).

See LAND, 4.

PRACTICE.

See ACTION AT LAW.

COMMISSIONERS.

COMMITTEE, 1, 6, 12.

CONSTRUCTION OF STATUTES, 3, 4.

COVENANT.

DAMAGE.

DEMURRER.

INJUNCTION, 2.

INVESTMENT, 8.

JURISDICTION, 2, 3.

PLEA.

1. That an objection stated by affidavit and remaining unanswered, that a plaintiff in equity was proceeding at the instigation and request of a rival Company, did not deprive him of his right to an injunction, and motion to dissolve an injunction refused with costs. *Colman v. The Eastern Counties Railway Co.*, 513

2. A plaintiff obtained an *ex parte* injunction, and at the same time gave notice of motion to extend his injunction, but the motion was not then heard. Defendants afterwards gave notice of motion to dissolve. Both parties claimed precedence:—*Held*, that the defendants, although later in date, were entitled from the nature of the motion to be first heard. *Braynton v. The London and North-western Railway Co.*, 553

3. The fact of a defence to a bill being founded on a great many acts of Parliament, which it was stated by affidavit must be perused and considered before the answer could be put in, is not sufficient excuse for delay in putting in such answer, and an order of the Master allowing six weeks further time discharged on application to the Court. *London and North-western Railway Co. v. Swainson*, 565

PROMOTER (OF COMPANY).

Plaintiff, the promoter of a railway project, entered into an agreement with a committee formed for carrying the same into effect, and consisting of thirteen persons, [A., B., C., D., E., F., G., H., J., K., L., M., and N.], that he should receive 1,500 shares (deposit free) for promoting and launching the Company, and should

be retained as their solicitor, and receive the amount of costs and expenses incurred when there should be sufficient funds in hand for that purpose.

A subscription deed was entered into, whereby all the members of the original committee (except A.), together with O., were nominated as the provisional committee of the Company, and the usual powers of removing and filling vacancies were given them, and it was declared that the majority of votes present at any meeting of the committee should bind the rest, and also the shareholders.

The provisional committee removed J. and K., two of the members of the original committee, and appointed P. and Q. in their places.

The terms of the original agreement were afterwards varied, and when varied, were consented to by the committee, and entered in the minute-book of the Company.

The bill was filed against all the members of the original and provisional committee, except A., J., and K., for the specific performance of the agreement as varied, for restraining the members in whose hands the funds of the Company were, from parting with any of them until plaintiff's demands had been satisfied, and for a declaration that plaintiff was entitled to a lien thereon.

The bill (among other things) charged, that the stipulation as to the retainer of the plaintiff as the solicitor of the Company had been long since abandoned by both parties.

Held, by the Vice-Chancellor of England, that a demurrer for want of equity and for want of parties be overruled.

That an agreement containing a stipulation which might vitiate it, becomes perfect and such as a court of equity will sanction, when parties mutually release each other from that stipulation.

Held, by the Lord Chancellor, on appeal, that the demurrer be allowed, on the ground that the bill contained no allegations to shew that the defendants had any scrip to deliver, but rather statements from which the contrary might be inferred. *Colombine v. Chichester*, 432

PURCHASE-MONEY.

See INVESTMENT.

RATES—RATING.

1. A railway company, formed under stat. 3 Will. 4, c. xxxiv., were empowered to purchase lands and construct a railway thereon; and to take certain tonnage and fares for goods and passengers, and to provide locomotive engines, &c., and receive such sums for the use thereof as the Company should fix. And when the Company themselves acted as carriers for their own profit (which they were empowered to do), they were to keep separate accounts of the tolls which they did receive, and of the tolls which they would have received for the passengers, &c., if they had been carried by other persons. All persons had liberty to use the railway with carriages, subject to regulations by the Company, and on payment of toll to them. The railway was used partly by the Company, as carriers of goods and passengers for their own profit, and partly by other Companies, who paid tolls to them for the use of it, some providing for themselves locomotive power, carriages, stations, and watering places, &c., and others finding carriages only, and hiring power, &c., from the Company.

In a rate made for the relief of the poor of a parish through which the railway passes, but in which there are no stations or buildings—*Held*, that the Company were rateable for their railway at an amount equal to the

rent which a lessee would pay, making the same uses of the railway as the Company; [that is, that they were rateable, after due deductions according to the Parochial Assessment Act, (6 & 7 Will. 4, c. 96, s. 1), on the sums which they received as fares and tonnage for passengers and goods which they carried, as well as on the amount of tolls which they received from other carriers on their railway]; and that an estimate of the Company's liability, founded on the amount chargeable in respect of tolls only, was erroneous.

The parish officers adopted, and the sessions approved the following mode of calculating the net annual value of the Company's rateable property in their parish.

They ascertained the gross receipts of the Company for one year, £440,366, and made therefrom the following deductions:—

1. £5 per cent. for interest on £255,000, the capital employed in engines, carriages, and other movable stock, in their business as carriers.
2. £20 per cent. on the same capital, for tenant's profits and profits of trade.
3. £12 10s. per cent. on the same, for the depreciation of such stock, beyond usual repairs and expenses.
4. £198,962, for the annual cost of conducting the business.
5. £9,150, for the land occupied by stations and other buildings, separately rated in the parishes in which they are situate.
6. £30 per mile, for the reproduction of rails, chairs, sleepers, &c.

Held, that these deductions (the reasonableness in amount of which is a question for the sessions) included all that was properly referable

to the trade, as distinguished from the increased value given by it to the land; and that the balance (£135,589) was properly taken as fairly representing the rent which a yearly tenant would give for the occupation of the railway.

And that no deduction was to be made for goodwill. *Reg. v. The Grand Junction Railway Co.*, 1

2. The Great Western Railway Company are owners and sole occupiers of a line of railway, 118 miles in length, and are also lessees and sole occupiers of two branch lines, forty-four and eighteen miles in length respectively, issuing out of the main line. Upon all these lines, they carry on exclusively a large trade as carriers, the receipts of which from the branch lines alone, if set against their expenses and rent, would make the occupation of them, in fact, a losing concern; but this occupation increases the traffic upon the main line.

The mode adopted by the parish officers in rating the railway was as follows:—They took the gross receipts per mile in the respondent parish. From this they deducted a mileage proportion of the expenses, and of the interest and tenant's profits on the plant of the whole line of railway, and rated the Company on the residue.

Held, that, among the above deductions, an allowance ought to be made in respect of the depreciation and wear and tear of the rails and sleepers, the solid timber and iron work of the main line, if paid out of the income of the Company, and charged as an item of annual expenditure before the division of profits, under s. 145 of their act (5 & 6 Will. 4, c. 107); but not if paid out of their capital.

And also for the rateable value of buildings appurtenant to the main line and branches, rated or rateable

elsewhere than in the respondent parish.

But that no allowance should be made for interest on the sum expended in procuring their act, raising their capital, and other original expenses.

Nor for additional parochial assessments which may become payable in consequence of the recent decisions of this Court on the subject.

Nor for the actual loss on the branch lines.

Quære, whether a deduction ought not to be made for all or part of the income-tax, which, by 5 & 6 Vict. c. 35, Schedule (A.), No. 3, is to be charged, in the case of railways, on the profits of the preceding year, in respect of the *property* thereof.

The reasonableness of the percentage to be deducted for tenant's profits is a question entirely for the sessions; but when the value of the plant has become diminished, the percentage should be calculated on the present, not the original value: such deduction, however, was not allowed to be made in this instance so as to increase the present rate. *Reg. v. The Great Western Railway Company*, 28

3. A Canal Act, 34 Geo. 3, c. 24, s. 19, provided, that the Company should be rated *to all parliamentary and parochial taxes and assessments* for their lands, &c., in the same proportion as other lands, &c., lying near the same, are or shall be rated, and as the same lands, &c., would be rateable in case the same were the property of individuals in their natural capacity.

By the 54 Geo. 3, c. 103, for making a fair and equal rate for the county in which the canal was situate, it was provided, s. 4, that the assessment should be made rateably according to the annual rent

or value of all estates within every parish.

By the 55 Geo. 3, c. 51, for the more easy assessing, collecting, and levying county rates, it is enacted, s. 1, that the sessions may order a fair and equal county rate to be made, and for that purpose to assess every parish, according to a certain rate of the full and fair annual value of the messuages, lands, tenements, and hereditaments rateable to the relief of the poor therein, *any law or statute to the contrary notwithstanding*.

Held, that the county rate was a parochial tax within the meaning of the first act, and that that act was not repealed by either of the later acts, and, therefore, that the property of the Canal Company was not liable to be rated at the increased value caused by the occupation of it. *Reg. v. The Inhabitants of Aylesbury*, 314

REGISTRATION.

See CONSTRUCTION OF STATUTES, 2, 3.

SHARES, 2.

REVERSION—REVERSIONS.

See INVESTMENT.

ROAD.

See CONSTRUCTION OF STATUTES, 7.

SCRIP.

See AGREEMENT, 2.

ALLOTTEE.

BANKRUPT.

COMMITTEE, 3.

CONSTRUCTION OF STATUTES, 2, 3.

The directors of the projected Kentish Coast Railway Company, having resolved not to issue scrip, some of the members, without their know-

ledge, issued scrip signed by the secretary from the office of the Company. This scrip found its way into the share-market, and was sold there at a premium. The plaintiff employed his broker to buy him some Kentish Coast Railway scrip, and the broker applied to the defendant, who sold him some of the above scrip. In an action to recover the price paid to the defendant, as having sold a spurious article:—*Held*, that the question for the jury was, whether the plaintiff intended to buy, and the defendant to sell that which was current in the market as Kentish Coast Railway scrip, or the real scrip of that Company. *Lamert v. Heath*, 302

SHARES.

See ALLOTMENT, 1.

CALLS.

COMMITTEE, 3, 6.

CONSTRUCTION OF STATUTES, 2, 3.

INFANT, 2.

1. In an action on a contract for not delivering railway shares, the measure of damages is the difference between the price of the shares at the time of the contract, and the day on which it is broken, allowing the purchaser reasonable time however to purchase shares. *Shaw v. Holland*, 150

2. The defendant authorised the plaintiff, a broker, to sell certain shares in a railway company, then lying at the Company's office for registration. The plaintiff sold them to R. Some correspondence took place between the plaintiff and defendant, on account of some delay in the transfer of the shares, and ultimately the defendant wrote a letter to the plaintiff requesting that all further communication should be made to his attorney. The transfer not having

been made, R., after giving the plaintiff notice, bought the same number of shares at an advance in price, and charged the plaintiff with the difference, which the plaintiff paid and then sued the defendant for the amount:—*Held*, first, that the plaintiff was authorised to sell registered shares only; secondly, that, inasmuch as no valid transfer could be made except by deed under the 8 & 9 Vict. c. 16, s. 14, R. was bound to have tendered a deed of transfer before he could have recovered against the plaintiff, and not having done so, the plaintiff made the payment to him in his own wrong; thirdly, that the above-mentioned letter did not amount to a refusal to complete the contract, so as to dispense with a tender of a deed of transfer. *Bowlby v. Bell*, 602

SOLICITORS.

See BILL OF COSTS.

COMMITTEE, 2, 7, 13.

SPECIFIC PERFORMANCE.

See INJUNCTION, 1.

STAMP.

See AGREEMENT, 2.

STATUTES.

See CONSTRUCTION OF STATUTES. RATING, 2, 3.

TAXATION.

See BILL OF COSTS.

TENANT IN TAIL.

See INVESTMENT, 3.

TIME.

See CONTRACT. DAMAGES.

TITHES (COMPENSATION FOR).

Under "The Act for Tithes in London," (37 Hen. 8, c. 12), the plaintiff, rector of St. O., was entitled to claim 2s. 9d. in the pound upon the rent reserved in lieu of tithes on all houses in his parish. A railway company, under the powers of their acts, purchased and took thirty-three of the houses in the said parish, being bound, by the 33rd section of one of their acts, to pay such yearly sums in respect of such houses, "according to the last assessments thereof, to the 25th March last," as would be equal to the loss in tithes which the rector might sustain for want of occupiers by reason of such taking:—*Held*, that the assessment mentioned in the Railway Act does not necessarily mean the assessment to the relief of the poor, but refers to the annual charge which the rector had made at the time mentioned in the act in respect of the annual value of the house as fixed by agreement or otherwise between himself and the occupier.

That the right of the rector to claim tithes was not limited to the amount of the annual value which, at the time of taking, was payable in respect of the houses so taken; but in the event of the Company rebuilding houses pro-

WRIT.

ducing a larger rental than those which they had originally taken, such houses would be liable to a new assessment.

That where no agreed annual value existed, the sum received by the rector for tithes must be presumed to be taken on the real annual value. *Letts v. The Blackwall Railway Company*, 530

WATER—WATERCOURSE—WATERWAY.

See BRIDGE.

COMMISSIONERS.

WRIT.

In a writ of summons against a company completely registered under the 7 & 8 Vict. c. 110, it is irregular to describe their supposed address as "now or late carrying on business in" &c.

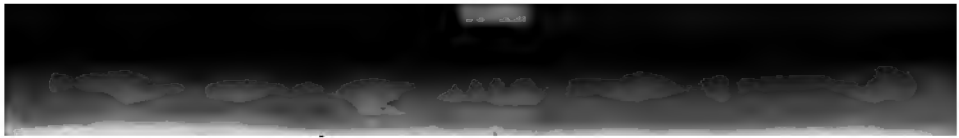
Service of a writ of summons against such company, described as of the city of London, on a director in the county of Middlesex, more than 200 yards from the border of the city of London:—*Held* to be bad. *Sem-ble*, that a party on whom a writ is so served may apply to set aside the service. *Pilbrow v. Pilbrow's Atmospheric Railway and Canal Propulsion Company*. 683

THE END.

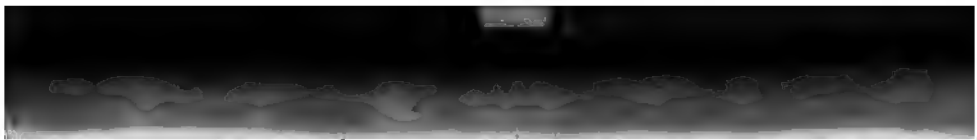
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